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Rhode Island Law Record

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A Periodical Devoted
to the Legal Profession

MAY 27th, 1921

Application for Entry as Second-Class Matter is Pending

Rhode Island Law Record

Vol. 1.

SUBSCRIPTION PRICE, \$18 A YEAR

No. 1

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
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Address All Communications to the R. I. Law Record, 518 Howard Building,
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PUBLISHERS' ANNOUNCEMENT

Our subscribers will undoubtedly be pleased to see that the Rhode Island Law Record appears this week in an up-to-date dress. Although it was the publishers' original intention not to change the duplicating process of getting out the Record to the printed form till next fall, the response of the lawyers in sending in their subscriptions was such as to justify the more modern method of publishing the court's activities at this time, even though the expense is greater.

We feel that the printed copy will meet with universal approval and hope that by making this desired improvement it will not be long before the Law Record is placed in every law office in the State. Any lawyer not already on the subscription list may have the Record mailed to him each week for the remainder of the present court term by remitting a check for \$2. Renewals will be solicited on a yearly basis thereafter.

The Law Record has wonderful possibilities of developing into a very valuable publication for the Rhode Island bar. In addition to printing the calendars and the decisions and opinions of both courts, it is planned to carry articles of interest to the profession within the near future. Manuscripts sent in will be promptly attended to.

AT THE EDITOR'S DESK

The Rhode Island Law Record has already justified its mission through real service to the members of the bar. It keeps them posted right up to the minute on every decision and opinion of both the Supreme and Superior Courts and saves them many steps and much time by publishing the calendars a week in advance.

With some of the most influential men of the State in the membership of the Rhode Island Bar Association it seems passing strange that all efforts to have a new courthouse built in this city have thus far been fruitless. To discover the reason, one has not far to go. The lawyers as an organization have not cooperated to the point of efficiency on this project. If all the attorneys got together and made up their minds to have a new courthouse they could have it. The Law Record will gladly lend its columns to an exchange of views on the matter.

Thomas F. Cooney, in a speech before a men's club in Pawtucket, last Monday evening, declared that no man should regard himself 100 per cent. American citizen unless he read the United States Constitution once a year. One would be aroused to a higher appreciation of American citizenship by so doing, he said.

JURY CALENDAR, WEEK OF MAY 30th

MONDAY, MAY 30

No Assignments.

TUESDAY, MAY 31, 1921

45245	McSoley	Louisa S. Wilson	Herman P. Wunsch	P. & DeP.
42277	Dorney	Celia Klinasiewska	Carl W. Johnson	G. H. & A.
47149	Flynn	Patrick J. O'Gara	Arnstie H. Cook	M. H. & G.
46806	McG. & S.	Johh T. Killian	John T. Considine	Jones
46807	McG. & S.	Katherine Killian	Same	Jones
46610	Stiness	Lustave Fox	T. F. Hunt Mfg. Co.	Dunn
49339	Easton	Arthur Jones	John F. Jacobson	Wildes
47567	McKenna	Charles Johnson	Rose C. Zarr	Stiness
49434	S. & L.	Sarac C. Webb	William M. Owen	Q. & K.
43081	P. & DeP.	Rosina Cortelessa	Salvatore Simonetti	J. E. D.
47083	L.B. & McC.	Like Oregon	Fred S. Crawford	Vance
49204	Gunn	Abdallah Abraham	William Nicholas	Corcoran
48831	McG. & S.	Herman Paster	Max Bedrick	B. & B.

WEDNESDAY, JUNE 1, 1921

45073	Witherow	City of Providence	George Engele	McG. & S.
47527	F. & H.	Kenneth Makant	Sam-O-Set Laundry	P. & S.
47528	F. & H.	Robert M. McGinnis	Same	P. & S.
47529	F. & H.	John E. McGinnis	Same	P. & S.
48499	W. & G.	F. P. Schauf	N. J. Pardkis	R. T. B.
48128	Burbank	William M. Carnoe	Charles F. Place	L. B. & McG.
47588	Raymond	New Acme P'tg Co.	Kescot Mfg. Co.	Gunning
49225	Q. & K.	Mary Carroll	Revere Rubber Co.	Bromson
49324	Gunning	Aymor R. Sanderson	Ivan Desendorf	G. M. & H.
47590	Stiness	Frantz Premier Co.	N. C. L. Eng. Co.	Veeneey
34763	F. & H.	Paul Casella	Rhode Island Co.	Kimball
49183	Cocney & C.	Thomas Walczak	Charles Bucholz	

THURSDAY, JUNE 2, 1921

47913	G. M. & H.	Julius M. Davis	Prov. Journal Co.	Barnefield
49059	Flynn	J. W. Degnan	J. R. Euslis	Walsh
49060	Flynn	Mary Degnan	Same	Walsh
49061	Flynn	J. W. Degnan, Jr.	Same	Walsh
49123	Johnson	Alice J. Cressy	Rhode Island Co.	Sweeney
49046	Bennett	Frank J. Williams	Morris Golin	Joslin
49045	Bennett	Thomas Williams	Same	Joslin
47987	F. & H.	Francis Parkhurst	Revere Rubber Co.	Gunning
48137	G. M. & H.	Standish Worsted Co.	Seymour Chemical Co.	G. H. & A.
45773	Littlefield	Carlo Goletto	Gu seppe A. Mercurio	P. & DeP.
45162	P. & DeP.	Edward Flynn	Edward M. Downing	G. E. & C.
45163	P. & DeP.	Josephine Flynn	Same	G. E. & C.
44845	G. M. & H.	Mary H. Kimball	A. C. Stewart	S. J. Casey
48647	Morrissey	Henry T. Wright	Ambrose Deslets	McG. & S.
48648	Morrissey	Mrs. Henry T. Wright	Same	McG. & S.
49649	Morrissey	Mrs. Julia Riley	Same	McG. & S.
49202	McG. & S.	Ambrose Deslets	Henry T. Wright	Morrissey

FRIDAY, JUNE 3, 1921

38520	W. & G.	Arnold C. Messler	Wimburg City F. I. Co.	H. E. & M.
47168	Gunning	John E. Hammond	John L. Straight	Jones
46657	P. & DeP.	Frank DePase	Rhode Island Co.	Eklund
45744	Stiness	Petent Vul. Roofing Co.	Thomas H. Early Co.	C. & B.
49195	C. & B.	George M. Bailey	Edith M. Potter	Murph
49172	Brand	Samuel Billingskoff	Bagdazar Barzhamian	L. B. & McC.
48039	Cooney & C.	John J. Quick	John Dallas	B. C.
49537	F. & H.	Hugh Ford	John B. Reilly C. T.	Connolly
40538	F. & H.	Mary Ford	Same	Connolly
48015	Romano	Frank V. Tuzio	George Corpron	West
49182	Agard	Am. Thread Co.	Martin Leo Kernan	

MISCELLANEOUS CALENDAR

SUPERIOR COURT

MONDAY
Legal Holiday

TUESDAY, MAY 31, 1921

Eq.4930 McKenna	Leonard P. Bosworth	Fred'k I. Johnson	
Eq.5447 J. S. Hewes	Jose Julia	Manuel Costa et al.	
		Prel. Inj.	
Eq.4233 P. & DeP.	Francesco Inundi	Guido Di Gregorio	
5450 Capotosto	Isabella Ramoguano	Pietro Ramoguano	G. F. Troy
	Jackvony		
Kent:			
Eq. 144 W. & G.	Albert A. Watson	Felix Rodamonz, et al.	Hebert
5453 Nathanson	Adam Zedziniah	Katarzina Rigel	
		Prel. Inj.	
5448 Benj.	Benjamin Rakatansky	Napoleon C. Robellard	
		Prel. Inj.	

WEDNESDAY, JUNE 1, 1921

Eq.4900 McSoley	Luke E. J. Kavanagh, et al.	Catherine Holland	Troy
Eq.5441 G. H. & A.	Herbert H. Brooks	Noah Lemay Co.	
		Dissolution	
Eq.5437 West	Wm. A. Gunning (Heard in part)	Peckham Bros.	
		Prel. Inj.	
Eq.5444 Farrell	Thos. S. Bennett	Fish, Bennett Co.	
		Dissolution	
Eq.5351 McMahon	Peter Canalopoulor	Patrick Kearns	Vance
Eq.5445 Cianciarulo	Erachio Mongrante	Oldsmobile Co. of Rhode Island	H. E. & M.
		Prel. Inj.	
Eq.5097 L.B.&McC.	Herbert G. Sayer et al.	Clark Sayer & Wall, Inc.	Paddock
Eq.5455 L. T. M.	Mary L. Wunsch	Thos. H. MacAuslan, et al.	Prel. Inj.
Eq.5304 E. & A.	Sullivan Ballou	Am. Wringer Co.	
		(Discharge of Temporary Receiver)	
4328 Knauer	John P. Brennan	John R. White & Sons, Inc.	G. M. & H.
		(Demurrer)	
Eq. G. F. Troy	Neven Gorneashall	Vincenzo Marzello	Veneziale
44713 C. & C.	Mary Dillon	F. W. Mark, et al.	
		Demurrer	
Eq.1882	Mass. Sprinkler, Power & Sanitary Engineering Company, et als.	Jeremiah P. Mahoney, Mayor of the City of Newport, et als.	

SUPREME COURT

Hamilton A. Gordon, et al. } Equity
 vs. } No. 468
 Robert J. Quinn et al. }

OPINION

May 25, 1921

(Before Mr. Justice Blodgett in Court Below)

PER CURIAM. This is a bill in equity to remove a cloud upon the complainant's title to certain land.

It appears that the complainants were the owners of thirty-eight house lots upon a certain plat in the town of Warwick. The value of each of said lots was small and the tax assessed against each of said lots on December 14, 1914, was very small. The complainants are non-resident heirs at law of a former owner, and appear to have been unaware of their ownership of said lots at the time said tax was due and payable. Said tax was not paid upon said lots, and for such non-payment the lots were sold at public auction by the tax collector of the town of Warwick to the respondent, Robert J. Quinn. At such auction sale it was necessary to sell the whole of each lot in order to pay the tax, interest, costs and expenses charged against such lot. A separate deed for each lot was delivered by the tax collector to said Robert J. Quinn.

After hearing in the Superior Court a final decree was entered adjudging said tax sale to be illegal, that said deeds purporting to convey title to said land constituted a cloud upon the title of the complainants, and were illegal and void. The decree ordered that said deeds be cancelled.

The case is before us upon the respondent's appeal from said decree. Section 12, Chapter 60, General Laws, 1909, provides for the sale of real estate for non-payment of taxes and is as follows: "In all cases where any parcel of real estate is liable for payment of taxes, so much thereof as is necessary to pay the tax, interest, costs and expenses, shall be sold by the collector, at public auc-

tion, to the highest bidder, after notice has been given of the levy, and of the time and place of sale, in some newspaper published in the town, if there be one, and if there be no newspaper published in the town, then in some newspaper published in the county, at least once a week for the space of three weeks and the collector shall also post up notices in two or more public places in the town for the same period." Under said section the tax collector is authorized to sell so much of any parcel of land as is necessary to pay the tax in arrears upon such parcel together with the interest upon the tax and the collector's legal costs and expenses.

The contention of the complainants is that the tax sales now in question are void for that the tax collector sought to obtain at such sale certain illegal and excessive amounts for expenses and hence in disregard of the provisions of the statute he sold more of each of said parcels than was necessary.

Besides the tax and interest, the amount of costs and expenses to recover which the collector sold each lot was as follows: Levy, \$1; advertising, \$1; preparing advertisement, \$1; examining title, drawing deed, auctioneer's fees, etc., \$4, a total of \$7.

In the absence of statutory provision, fixing the amount of his compensation, the collector would be entitled to include as expenses a reasonable charge for the performance of such duties as the law imposes upon him, and also the sums necessarily paid out by him in connection with the levy upon the sale of the real estate for unpaid taxes.

With regard to the last item of \$4, among the expenses claimed by the collector, there is no evidence tending to show that the charge is excessive for the matters included, and it does not appear to us to be so. We think, however, that the collector should have specified his charge for each of the expenses included therein. It does appear in evidence that his charge for drawing the deed was \$2 and the complainants contend that this charge was illegal, be-

cause all of the thirty-eight lots of the complainants were sold to the same purchaser and the collector should have made one deed for the whole and not thirty-eight separate deeds. This objection of the complainants overlooks the requirement of the law that each parcel shall be assessed separately. The collector in order to recover the tax, interest and expenses upon a lot was obliged to sell such lot or so much thereof as was necessary, and in making the sale he was obliged to state the total of his charges against the lot, in order that a purchaser might determine what part of the lot he would be willing to take for the amount of the tax, interest and expenses. As the collector could not assume before the sale of a lot, that such lot would be sold to the same person who purchased the other thirty-seven, the collector was obliged to include in the expenses chargeable against such lot a charge for drawing his deed to the lot or to such part thereof as it would be necessary to sell. We do not regard this objection of the complainant as valid.

The only statutory provision fixing the amount of a tax collector's fees and regulating his charges for expenses in connection with the levy upon and sale of property for unpaid taxes is contained in Section 4, Chapter 62, General Laws, 1909, which, among other things, provides "in case of distraint of personal property, or levy on land, the collector shall have the same fees as sheriffs have in similar cases." Under Section 11, Chapter 364, General Laws, 1909, a sheriff is allowed a fee of fifty cents for serving an execution by levy on real estate and a fee of one dollar for advertising real estate to be sold at auction.

It appears that it is the custom throughout the State for city treasurers and tax collectors to make a charge of one dollar for levy upon property for unpaid taxes. Fifty cents of this charge is warranted by statute for the entry of the levy in the levy book. We do not believe that the remainder of the charge is made with the intent of extortion or without a definite legitimate purpose.

After the levy the law requires the collector to give notice of the same by preparing and posting in three public places in the town a notice of the levy and of the time and place of sale. This is a service for which the collector or city treasurer is entitled to compensation. We cannot say that fifty cents is an excessive charge for this service. As the collector does not make the charge as a separate item, in his list of expenses, we think it probable that the custom has grown up among tax collectors of making a charge of one dollar for levy which includes the charge of fifty cents for the public notices of the levy. We should regard it as much the better practice for tax collectors to itemize their charges. This appears to us to be a reasonable explanation of the charge of one dollar for levy made by tax collectors throughout the State. The attorney for the tax collector in this case, however, while testifying as a witness in regard to these charges for expenses does not make this explanation, but treats the matter of posting notices as included under another item of expense where it clearly does not belong.

In regard to the charge for advertising it appears that it is the custom of tax collectors to publish in one advertisement the sale of all parcels of land to be sold on the same day for taxes in arrears. In our opinion in such circumstances a collector should charge against each parcel sold a fairly proportionate part of the sums actually paid to the newspaper publisher for the advertisement which includes notice of the sale of such parcel. It appears that the notice of the sale of the thirty-eight lots in question was included in an advertisement giving notice of the sale of a number of other parcels of land. There is no testimony before us from which we can positively determine the amount paid by the collector for the newspaper advertisement which included notice of the sale of these house lots. Counsel for the complainants in his brief and argument before us treats it as established that such payment was \$97.20. Such was not the fact. In the examina-

tion of a witness, counsel for the complainants assumed that the amount so paid was \$97.20 and treated that sum merely as an assumption used in such examination. The most that we can say in the matter is that we might conjecture, if it were permissible for us to do so, that of the newspaper bill some cents, slightly less than one dollar, rather than one dollar should have been charged against each of said lots.

The fee of one dollar for preparing the advertisement of sale is warranted by statute.

We may fairly say that the complainants have failed to establish that the sum of the collector's charges against each of said lots is excessive.

Respondent's appeal is sustained, the decree appealed from is reversed, the cause is remanded to the Superior Court with direction to enter a decree dismissing the bill.

For Petitioner: Alfred G. Chaffee.

For Respondent: Quinn & Kernan.

SUPREME COURT

John F. Paine }
vs. } Ex. &c., No. 5455
Ida J. Paine }

OPINION

May 26, 1921

(Before Mr. Justice Blodgett Below)

RATHBUN, J. The original action was a petition for divorce. The record shows that on October 4, 1919, after hearing in the Superior Court on the merits, a decision was rendered granting the petition for divorce. No motion for a new trial was made within seven days thereafter and no action was taken in the case until March 25, 1920, when the following motion was filed. "I hereby enter my appearance for the respondent and move that decision for petitioner heretofore granted on October 4th, 1919, be vacated and that the petition be reinstated. By her attorney, William R. Champlin." On April 5, 1920, the respondent filed another motion as

follows: "Now within six months after decision for the petitioner in the above entitled cause comes the respondent, Ida J. Paine, and, supplementing her motion heretofore filed on March 25th, 1920, wherein she moved that said decision be vacated and said petition be reinstated, petitions this Honorable Court to set aside said decision heretofore rendered for said petitioner and reinstate the cause, or make new entry and take other proceedings, with proper notice to parties, with or without terms, as it may direct by general rule or special order and as grounds therefor says: * ** The latter motion assigns as grounds therefor the grounds usually alleged in a motion for a new trial including newly discovered evidence; also that the respondent's illness at the time of the trial prevented her making a full defence to said petition and that the court was without jurisdiction for the reason that neither of the parties was a resident of this State. The cause is before this court on respondent's exception to the decision of said justice denying the above motions.

The respondent by said motions asks (1) that the decision be vacated and the petition reinstated; (2) that the decision be vacated on the ground that the court did not have a jurisdiction of the parties. The respondent in asking to have the petition reinstated evidently is seeking to obtain either a rehearing or a further hearing of the petition on the merits.

Within seven days after decision granting the petition for divorce the respondent could have filed a motion for a new trial on the ground of newly discovered evidence, but on no other ground. G. L., 1909, Chap. 298, Sec. 13. On the denial of such a motion a bill of exceptions can be prosecuted to this court. Sec. 17 of said chapter. But after the expiration of seven days after notice of decision on the merits (and before entry of final decree), motions to reinstate petitions for divorce are addressed to the discretion of the Superior Court and unless the court clearly abuses its discretion the action of said

court in granting or denying such motions will not be reviewed by this court. *Thrift v. Thrift*, 30 R. I. 456; *Mahoney v. Mahoney*, 30 R. I. 458.

We will now consider that phase of the respondent's motion which appears to be a motion to vacate the decision on the ground that the court did not have jurisdiction of the parties for the reason, as the respondent contends, that the petitioner had not "been a domiciled inhabitant of this State," who had resided therein for the period of two years next before the preferring of such petition," as required by Sec. 10, Chap. 247, G. L. 1909. The respondent is now asking not for a rehearing or a further hearing, but suggesting that the petition should be denied and dismissed.

The respondent was present at the trial and the question of residence was an issue that was strenuously contended. The court, after considering all of the evidence, decided as a question of fact that the petitioner's residence was in this State at the time the petition was preferred and had been for a time sufficient to give the court jurisdiction.

The respondent relies on *Johnston v. Johnston*, 37 R. I. 362, wherein this court, at p. 370, said: "Where a final decree of divorce has been procured by means of fraud practiced by the petitioner, in which the respondent has not participated, and where the court has been induced by that fraud to take jurisdiction of a case of which it in fact had no jurisdiction, the decree will be vacated, even after the lapse of years." The fraud referred to was not fraud in producing false testimony as to residence as is here suggested. The respondent in *Johnston v. Johnston*, supra, was not present at the trial. After entry of final decree he filed a petition, alleging that he was not served with notice of the original citation which notice purported to have been served by a disinterested person. A petition to vacate has been entertained in other cases where it was alleged that the respondent did not receive notice and that service was made on some person fraudulently impersonating the respondent,

(*Lock v. Lock*, 18 R. I. 716), or that the petitioner made a false affidavit to the effect that the petitioner had no knowledge as to the respondent's whereabouts thereby causing the court to order service by publication. *De Souza v. De Souza*, 92 Atl. 983; *Elmgren v. Elmgren*, 25 R. I. 177.

The respondent was duly served with notice of the petition for divorce. She appeared and defended the petition. She denied the Court's jurisdiction at the time of trial. Jurisdiction was a question of fact. The court had jurisdiction to determine the questions of fact upon which the question of jurisdiction depended and after a full hearing upon the question the court decided that the petitioner was a domiciled inhabitant of this State and had been for the length of time required to give the court jurisdiction. The respondent took no steps to have the decision reviewed within the time prescribed by statute. The justice who granted the petition heard the respondent's motions and after considering her affidavits found no reason for disturbing his decision that the court had jurisdiction and that the petitioner was entitled to a divorce. Said justice did not abuse his discretion in denying the respondent's motions.

The respondent's exception is overruled and the case is remitted to the Superior Court for the entry of a decree for the petitioner upon its decision rendered on October 4, 1919.

For Petitioner: Walling & Walling.

For Respondent: William R. Champlin

SUPREME COURT

Herbert A. Rice, Atty. G. ex rel.) M. P.
v.)
William A. Clarke) No. 359

OPINION

May 26, 1921

(Originally In Supreme Court)

RATHBUN, J. This is an information in the nature of quo warranto brought by Herbert A. Rice, Attorney General

of the State of Rhode Island, at the relation of Ralph G. P. Hull, a duly qualified elector of the town of Jamestown, asking this court to inquire as to the right of the respondent, William A. Clarke, to hold the office of town treasurer of said town of Jamestown and to exercise the duties thereof for the year 1921-1922.

The information sets forth that the annual town meeting for the election of town offices, including town treasurer, of said town for the then ensuing year was legally holden in said town on the 6th day of April, 1921; that at said election the only candidates for the office of town treasurer were said Ralph G. P. Hull and said respondent, William A. Clarke; that the moderator and clerk of said town the officers legally constituted and appointed to examine and count said ballots, counted as lawful ballots lawfully cast 282 for said William A. Clarke and 280 for said Ralph G. P. Hull and then and there declared as the result of said count of said ballots said William A. Clarke to be the duly elected town treasurer of said town of Jamestown; that said moderator and clerk refused to count several ballots, more than three in number, which were legally cast for said Ralph G. P. Hull for town treasurer and that said Ralph G. P. Hull received a plurality of all the votes legally cast for said office of town treasurer.

It appears that the printed ballots as prepared by the town clerk contained but one list of candidates for the various offices to be filled, viz., the candidates of the Republican party which list of names was printed in a single column under the Republican emblem; that at the right of and parallel with said column was arranged a series of spaces duly and properly arranged so that any elector wishing to vote for persons other than those whose names were printed upon said ballots might write therein the name of the person of his choice and that at the right of each of such spaces for inserting names was a space in which an elector who had written the name of the

person for whom he desired to vote might place a cross (X).

Seven ballots which were cast at said election were introduced in evidence. Each of said ballots contained the name of Ralph G. P. Hull, written in the proper space under the words, "FOR TOWN TREASURER." Each of said ballots shows that the elector who prepared it made no cross (X) in the circle under the emblem or in a square opposite any name printed on the ballot. In no instance did the voter place a cross (X) in the square at the right of the written name. Said moderator and clerk refused to count any one of said seven ballots for Ralph G. P. Hull for town treasurer for the reason that the ballots contained no cross (X) in the square opposite the written name of Ralph G. P. Hull.

When a voter, desiring to vote for a person whose name is not printed on the ballot, writes in the right-hand column prepared for that purpose under the proper titles of office the name of the person for whom he desires to vote it is necessary in order to make a vote for such person effective that the voter make a cross (X) in the square opposite the name which he has written. Section 43 of Chapter 11, General Laws, 1909, contains, among other provisions, the following language: "he (the voter) * * shall vote for the candidate of his choice by marking a cross (X) in the square opposite the name of the candidate of his choice, or by writing in the right-hand column prepared for that purpose, under the proper title of the office, the name of the person for whom he desires to vote. In such case the vote shall be counted for the candidate against whose name a cross has been so marked, or whose name has been so inserted in the right-hand column." It is clear that the statute does not require that the voter make a cross (X) in the square after the name which he has written and there appears to be no reason for making the cross (X). The intention of the voter is clearly expressed by writing the name of the person for whom the voter desires to vote.

We are therefore of the opinion that all of said seven ballots should have been counted for said Ralph G. P. Hull. Said Ralph G. P. Hull received 287 votes and the respondent, William A. Clarke, received 282 votes.

Our conclusion is that said Ralph G. P. Hull was at said election duly elected town treasurer of said town of Jamestown and that he is entitled to said office.

Let judgment of ouster against respondent, William A. Clarke, be entered.

For Petitioner: Frank F. and John H. Nolan.

For Respondent: Sheffield & Harvey.

SUPREME COURT

Morr's Rotman
vs.
Leo Muslin

} Eq. No. 519

RESCRIPT

On motion of respondent it is made to appear that an emergency exists which calls for an early hearing of respondent's appeal from decree for preliminary injunction. Said appeal is assigned for hearing June 6, 1921. The parties are hereby required to appear for hearing upon said appeal on that day.

(The petitioner in the above-named case filed a bill of complaint in the Superior Court to enjoin the respondent, a former partner of the petitioner, in the retail drug business on Orms street, Providence, from continuing another drug business a few doors away. Presiding Justice Tanner granted a preliminary injunction on evidence submitted by the petitioner that the respondent, after selling his half-interest in the original business, agreed not to start up in a similar business within a quarter of a mile for one year. The petitioner claimed that the respondent started up another drug business within a quarter of a mile and before the expiration of the year's time. The injunction issued out of the Superior Court closed up the respondent's store and it would remain closed all summer with the

controversy undecided by the Supreme Court unless the latter tribunal granted early hearing.)—Ed.

For Petitioner: Judas Semenoff.

For Respondent: Robinson & Robinson and McGovern & Slattery.

SUPERIOR COURT

PROVIDENCE, Sc.

Sarah A. McDonald }
vs. } W. C. A., No. 179
Rhode Island Co. }

RESCRIPT

May 23, 1921

Barrows, J. Heard on dependent sister's, petition for compensation for the death of one John McDonald.

The only question in dispute is whether the petitioner's brother was killed in an accident arising out of and in the course of his employment.

We shall not attempt to distinguish the difference in meaning between the words "out of" and "in the course of" his employment. This has been done in Fitzgerald vs. Clark & Son, 1 B. W. C. C. 197, quoted in Rayner vs. Sleight, 180 Mich. 168

The facts are that John McDonald had been employed by defendant for seven months running an elevator to remove ashes at the Manchester Street Power House. The elevator ran from the coal pocket to the ash cellar. Deceased's duties also required him at times to give slight assistance at his elevator to a man pushing out a small car of ashes.

On May 5th, 1917, a few minutes before 12 o'clock noon, McDonald fell into a sump hole located in the ash cellar and filled with steam and hot water. The hole was 75 feet from his elevator and no contention is made that his duties took him near the hole. At the time of the accident he was on the way from the elevator to the wash-room to clean up before going home.

There were several ways within the building by which a person could have gone to the wash-room from the point where McDonald left the elevator. Three of these were commonly and regularly

used for such purpose. The fourth, which was the way taken by McDonald, was a possible way but was not used as a regular practice. The cellar was not well lighted near the sump hole. The route of deceased led across the ash-room floor beside a trench and alongside or across the sump hole to another part of the cellar, and thence to some stairs by which one could go up to the wash-room above. This route a former elevator operator says he used commonly. He says it was the nearest way to the wash-room. The difference in distance between this and other routes is inappreciable. This operator says he always went around and never across the sump hole. There is no evidence that deceased knew of the former elevator man's use of this route. That operator ceased to be employed there more than six months prior to the time when deceased went to work for respondent.

In emergencies ashes were wheeled out of the cellar over planks laid across the sump hole by the ash man. Those so wheeling ashes received particular caution about the danger of the sump hole. No one in authority knew of the use of this route by anyone as a means of going from the elevator to the ash-room. The boiler room engineer, Almeida, under whom McDonald worked, says that the use of this route was not a recognized or customary one. He admits that he has crossed the sump hole and seen others do so several times. There is no evidence that he ever saw McDonald do so.

Gonsales, the ash man, had crossed the sump hole and says he had seen McDonald do so several times. The floor along the sump hole was generally wet. While traversing beside the sump hole or on the planks across it, McDonald fell in and was scalded so badly that he died about four hours later. No instructions ever had been given to him not to cross the hole to go to the wash-room, nor had he been instructed to keep out of this part of the ash-room, unless his general instructions be so construed. These were not to interfere with any-

thing in the building which he was not well acquainted with.

Our view of the premises convinces us that the use of this way was obviously fraught with some danger because one had to pass along the wet floor under several steam pipes, which were 38 inches above the floor at the hole and across or near planks covering a part of the sump hole, from which steam constantly was arising. The blow-off pipes from the boilers also are located 50 inches above the sump hole.

On these facts respondent urges that McDonald, in selecting the course chosen, did not suffer death by reason of the accident arising out of and in the course of his employment.

We have examined carefully the authorities presented by both sides. Our investigation leads us to believe that the authorities have generally held that in circumstances like the above the accident did not arise out of and in the course of employment. All injuries occurring to a workman while on the premises of the employer are not covered by the Compensation Act. As we read the cases, the risks covered are only those incidental to normal, expressly ordered or emergency performance of duties of the employee.

Travel to the wash-room on the way to lunch after employment is recognized as being within the course of employment.

Sundines Case, 218 Mass. 1.

In some cases the adoption of a dangerous or uncommon route has been held not to take the employee outside of his employment.

Vonn Ett. 111 N. E. 696 (Mass 1916).
Madden vs. Whelan, 38 N. J. L. J. 113
Sneddon et al. vs. Greenfield Coal & Brick Co., 3 B. W. C. C. 557.

McGuire vs. Gabbott. 10 N. C. C. A. 356, Note.

Two of these cases turn on the course of conduct which would have been outside the employment but was not so considered by reason of custom or practice known to the employer. Another was the case of a lost miner trying to find

his way to his place of employment, and the other was a case where the employee had not been informed of the proper route.

We think the weight of the law is that an employee injured during working hours and on his employer's premises, while using as an exit an obviously dangerous and uncommon route without the knowledge or approval of the employer, does not suffer an accident arising out of and in the course of his employment.

Hendry vs. United Collieries Ltd. 3 B. W. C. C. 567

Haley vs. United Collieries Ltd. 44 Scottish Law Reporter, 193.

Thomson vs. Flemington Coal Co., Ltd. 4 B. W. C. C. 406, Cf. also

Rose vs. Morrison & Mason, Ltd. 4 B. W. C. C. 277.

McLuckier vs. John Watson. 6 B. W. C. C. 277.

Oliver vs. Smith, 38 N. J. L. J. 148

Brinckman vs. Harris, 1916 Workmen's Compensation & Insurance Reports, page 45.

We therefore find that petitioner is not entitled to compensation, because the accident did not arise out of and in the course of deceased's employment.

For Petitioner: Fitzgerald & Higgins
For Respondent: Clifford Whipple

Rhode Island attorneys who have appeared before the United States Supreme Court know that all the encomiums published of the late Chief Justice White are true.

They will probably recall how the sharp eye of the Chief Justice looked down upon them as though it could penetrate right through them and how his keen intellect grasped the drift of an argument amazingly quick. And woe be to the lawyer who got up to address the court with a prepared argument without being able to digress at the rapid-fire questioning from the court. The writer recalls how members of the court bombarded Attorney General Rice with questions at the outset of his argument on

Rhode Island's fight against the Eighteenth Amendment. But Mr. Rice, who had studied the subject for months, was competent to answer their questions, and after ten minutes, he was allowed to proceed with very little interruption.

Lawyers have said that the United States Supreme Court is the most democratic court in the world. On leaving the bench in their robes it is not infrequent to see members of the court stop on their way to chambers to chat with some friends. The greatness of the august tribunal resides in the judges themselves as one Rhode Island attorney expressed it.

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Rhode Island Law Record

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SUBSCRIPTION PRICE, \$18 A YEAR

No. 2

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PUBLISHERS' ANNOUNCEMENT

The publishers of the Rhode Island Law Record take pride in announcing that the printed edition of the Record last week met with unqualified approval. Each week brings new subscribers and when the fall term of the court begins in September it is expected that the great majority of the lawyers will be receiving this weekly service. The Rhode Island Law Record now seems assured of being a permanent institution.

Subscriptions are now being taken only for the remainder of the present court term. Renewals will be solicited on a yearly or quarterly basis at the opening of the new term in the fall. A check for \$2 will bring the Record each week for the rest of the term to any attorney not already a subscriber.

The lawyers themselves by taking a personal interest in the Record by sending in their subscriptions and contributing comments or criticisms can assist in promoting this enterprise to a high level of efficiency.

SUPERIOR COURT

The court gives notice that contested and uncontested petitions for divorce will be in order for hearing July 5, 6, 7 and 8. Contested petitions must be assigned to a day certain.

AT THE EDITOR'S DESK

Touching upon the subject of a rapidly increasing sphere of usefulness, it may not be amiss to remark that the Rhode Island Law Record has already achieved circulation, not only in our own State, but in Massachusetts, Connecticut and New York, as witness the following:

"THE PULLMAN COMPANY,

Office of the Superintendent,
New York, May 25, 1921,

Subject: Loss of a set of Law Papers
Rhode Island Law Record,
518 Howard Building,
Providence, R. I.

Gentlemen:

I am attaching hereto file of papers which was found in car Talaria, line 1471, arriving here May 17, 1921.

Passenger occupied seat No. 17 and got off at Springfield. These papers, no doubt, are valuable. Will you kindly acknowledge receipt of same by signing and returning the attached Lost Article Tag. for our file.

(Signed)

Yours truly
F. E. COOK.

The papers referred to were the typewritten sheets which made up one of the recent issues of the Law Record. We feel compelled to modestly record the fact that Supt. Cook's opinion as to its value is in line with the commendations already received from many subscribers who are members of the R. I. Bar. Appreciation of a legal publication from a non-professional source may perhaps be considered a little unusual.

JURY CALENDAR, WEEK OF JUNE 6th

MONDAY, JUNE 6, 1921

4603	Walsh	Patrick J. Mulvaney	Walter L. Clarke, C. T.	Chace
49176	T. & C.	Paul C. McAbee	Natl. Wholesale Grocery	Cooney & C.
46831	Johnson	Mason T. & R. Co.	Rhody Auto Supply Co.	W. C. & C.
41613	R. & R.	Ida Lippman	Benoni Hawkins	Ziegler
41614	R. & R.	Elizabeth Cohen	Same	Ziegler
41615	R. & R.	Martin Lippman	Same	Ziegler
49209	F. & M.	Frieda Johnson	Charles Lee	Grimes
49389	L. B. & McC	Carmine Gianquitti	Antonio Catanbaro	Veneziale
49390	L. B. & McC	Luigi Gianquitti	Same	Veneziale
49425	F. & H.	Albert Madeira	Samuel Brownridge	P. & S.
49426	F. & H.	John Madeira	Same	P. & S.
46443	W. & G.	City of Providence	Dario Bacchocchi	P. & DeP.
44619	A. & A.	Marie L. Bouchard	L'Alliance Nationale	Archambault
49615	Osterman	Andred C. Blais	Sarah J. McDonald	M. & M.
43101	Knauer	Patrick F. Mulvey	Thomas H. Earley Co.	McG. & S.
43102	Knauer	Abbie T. Mulvey	Same	McG. & S.

TUESDAY, JUNE 7, 1921

46481	Colton	Segar Jardin	Robert V. Mulvey	Chace
49124	Johnson	Farmers Bank	F. A. Marsden & Son	Breadan
49055	Bowen	Everett M. Fenner	Charles A. Knight	Capotosto, J.
47537	Rivelli	Nannina Greco	Vincent Di Vincenzo	P. & DeP.
40504	Trov	Ernestine K. Frieberger	Hallis N. Smith	H. E. & M.
49197	McG. & S.	Met. Wholesale Grocery	Constantine Riberio	F. & H.
49399	Walsh	John P. Cooney	Moses Frank	
48406	F. & H.	Joseph Ott	Royal Weaving Co.	Jenks
49592	Levy	Madeline McCauley	Walter J. Hearn	W. & G.
48950	Prescott	Ralph A. Moore	Hubert Higgins	Barnefield
41946	L. B. & McC	Robert H. Collamore	Frances Rusack	Raymond
41947	L. B. & McC	Anna E. J. Collamore	Same	Raymond
43725	P. & DeP.	Domenico Malveta	Albert H. Sydney	McG. & S.
43726	P. & DeP.	Domenico Malveta	Same	McG. & S.
42304	Cooney & C.	Lawrence A. Geary	George F. Smith	M. H. & E.

WEDNESDAY, JUNE 8, 1921

48670	F. & M.	Michael Goldberger	Hvman M. Lyon	P. & DeP.
46801	Boudreau	Lillian F. Brackett	Harry C. Griswold	T. & L. Flynn
46802	Boudreau	William H. Brackett	Same	T. & L. Flynn
48116	Flynn	Fred B'shop	William R. Fitts	Woolley
48115	Flynn	Delia Bishop	Same	Woolley
36982	T. & C.	Helen M. Scott	Henrietta A. Longley	W. & G.—L.
45064	Knauer	John J. Peardon	N. E. Grocery Co.	G. M. & H.
44196	Yatman	City of Providence	Patrick Finnerty	Vance
49431	L. B. & McC	Donato Leone	Grocers Baking Co.	Flynn
49640	F. & H.	J. D. Halliday	B. Flink	Joslin
49641	F. & H.	Same	B. Flink & Sons	Joslin
49151	Q. & K.	Emma Freethy	Oscar Schoonbard	F. & H. W&W

THURSDAY, JUNE 9, 1921

34173	F. & M.	George Kirk	Fenner Ball	Knauer
49042	F. & H.	G. Fandetti	M. Di Magistris	R. S. & L.
48765	Henshaw	Anthony Czubak	John B. Payne	Phillips
46489	J. B. L.	City of Providence	Louis George	P. & DeP.
48766	Henshaw	Sophie Czubak	John B. Payne	Phillips
49397	Ziegler	Mary Brown	R. I. Distributing Co.	G. H. & A.
PA752	W. & G.	Alice B. Munro	Eliza A. McCausland	B. S. & L.
PA753	W. & G.	Leslie Hull	Same	B. S. & L.
49657	McG. & S.	Annie Jacobson	F. W. Woolworth Co.	Q. & K.
49613	Bennett	Julia E. Keegan	Thomas K. Fisher	Murphy
48631	McG. & S.	Ida L. R. Reiner	Nicholas Reiner	F. & H.

48637	Higgins	Ovide Auger, Jr.	Rhode Island Co.	Williams
42505	West	James A. Berrigan	Adalard H. Payette	A. & A.
15298	Dorney	Mary C. Hackett	Mardardek Najarian	Lindemuth
37781	C. & C.	Thomas F. Joyce	Rhode Island Co.	Whipple
FRIDAY, JUNE 10, 1921				
47635	C. & O'C.	Patrick F. Waldron	Hopkins Transfer Co.	L. B. & McC.
38374	E. & A.	Emma L. Payson	Effie M. Mix	F. & H.
45175	G. E. & C.	Lonsdale Co.	Charles Fierstein	Cooney & C.
27066	B. & W.	Blais-Baker Horse Co.	James Hennessy	W. & G.
46429	Beagan	Wm. J. Rooney & Sons	Rhode Island Co.	Eklund
45065	Knauer	John J. Reardon	N. E. Grocery	G. M. & H.
48681	P. & DeP.	Joseph Weisman	Joseph J. Bedard	Dillon
47485	H. E. & M.	D. W. Flint Gasoline	Louis M. Berman	L. B. & McC
49524	H. E. & M.	Jemema MacFarlane	N.Y., N.H. & H. R.R. Co.	Phillips
49621	Ziegler	Helen A. Bodwell	Arthur L. Johnson	R. T. B.
MP499	C. C. & McC	Fred Longbottom	City of Providence	Chace

MISCELLANEOUS CALENDAR

SUPERIOR COURT

MONDAY, JUNE 6, 1921

J. T. W.	Matteson	Emma H. Kimball	Mass. Accident Co.	Morrissey
48239	Brown			
5237	W. & W.	O. P. French & Sons Co.	Nyanza Mich	
Assgt.				
161	R. & R.	In re Assignment of Nathan Rosenbloom	Allowance of Account	
Assgt.				
162	R. & R.	In re Assignment of Harzel & Kushner	Allowance of Account	
5314	Costello	Annie Aiken	Mary M. Cashman et al.	Connolly
Assgt.	R. & R.	In re Assignment of Stanly Cibor		
C. L. A.				
164	R. & R.	In re Assignment of Harry Choet	Allowance of Account	
E5457	C. C. & McC	Mariano J. Mideiros	Manuel D. Cravuro	
E5459	Remington	David E. Morgan	Prel. Inj.	
			John Peterson	
			Prel. Inj.	

TUESDAY, JUNE 7, 1921

Pot. 283	J. J. N. Jr.	Ignaty Shilo Admr.	Nomabochem	C. C. & Mc.
48634	J. H. Ricard	Vitilina Hewett	Clarence N. Hewett	G. K. & G.
			D-murrer	
47163	C. C. & McC	Michael Kokowska	Isaac Moses	P. C. Joslin
5133	Slocum	W. Abrams	Allie Zura	D. & B.
5134	Slocum	Samuel Schneider	Allie Zura	R. & B.
5135	Slocum	William Chernick	Allie Zura	R. & B.
5447	J. D. Neven	Jose Julio	Manuel Costa et al.	
			Prel. Inj.	J. F. Murphy
5450	Capotosto	Isabella Ramognano	Pietro Tamaguan. et al.	
Kent	W. & G.	Albert A. Watson	Felix Rodanmerz	F. Hebert
			Contempt	

WEDNESDAY, JUNE 8, 1921

P. A. 774	O. & K.	George L. Luther	Joseph Gough	
F5454	E. & A.	Charles L. Carpenter	Zenas W. Bliss, et al.	
		et al.		
F5422	P. W. G.	William C. Johnson	Edward S. Judkins	
			Prel. Inj.	
E4930	C. H. McK.	Leonard P. Bosworth	Frederick I. Johnson	

DISTRICT COURT APPEALS

MONDAY, JUNE 6, 1921

49820 B. & B.	Esther Bellive	Isadore Trotsky	R. & R.
49966 Marcus	Gussie Fried	Simon F. Carwell	Q. & McK.
29566 McSoley	Isabella A. McMinnum	Annie Murray	F. & H.
46537 Stiness	John B. Lavelle	A. M. Chase	Ziegler
33913 Easton	Votta & D'Ordine	Angelo Salvatore	S. & S.
49256 Slocum	Smith & Holden Co.	Eugene Elec. Co.	P. & DeP.
49254 P. & DeP.	William A. Bushman	R. I. Company	Eklund
47906 LeCount	Ida Williams	Edward Davis	Colton
36630 P. & DeP.	Domenico Martins	Vincenzo Zanni	Collins
48899 Owen	Herbert G. Partridge	L. B. Price	B. & B.
47602 Brand	William Beaunstein	Louis Mayberg	Alazander
49731 R. & R.	Manhattan W'esale Groc.	Philip Mitchell	B. & B.
49767 Singen	Howard R. Lord	Mannie Isaacs	Raymond
49831 Holton	Edward I. Briggs	W. P. Hamblin	G. E. & C.
49843 T. & C.	T. B. Colwell	Y. Dardarion	Dorney
49021 Nolan	Abraham Corey	George J. Hickey	Beagan
48690 C. & O'C.	Charles J. La Fluor	A. Berman & Son	L. B. & McC.
49955 Edwards	Everett D. Higgins	John S. Perry	Richmond
49501 M. & T.	St. Louis Rub. C't Co.	Millers, Ins.	Wildes
49452 Cona y	F. A. Decker Co.	William J. Donovan	F. & M.
45678 Osterman	George L. Porter	Henry Cloutier	J. B. L.
50025 Rustig an	H. Emizian	Dental Supply Co.	R. & R.
50026 Adelman	Adolph Hirsch	H. Emerzian	Rustigian
50034 Atwood	Gulf Refining Co.	J. T. Gogg'n	Cooney & C.
50035 R. & R.	Julius Kritz	H. B. Payers	McDonald
50041 Easton	Guistino DeBenedicts	William Shartenberg	S. K. & S.
50090 Salisbury	Walter Simpson	M. Fishman	Walsh

TUESDAY, JUNE 7, 1921

35820 W. & G.	H. Mortimer Sanger	Rhode Island Co.	Sweeney
45337 Stiness	Opler Bros.	Max Korn	Wildes
48587 Crane	Manuel Costa	Mrs. Mulligan	Connolly
48588 Crane	Joseph Costa	Same	Connolly
48383 McKenna	Jeanett M. Smiley	Fred C. B. Strong	P. & DeP.
48868 W. & W.	Peter Krizyna	Myer Haas	Semonoff
49063 Costello	Hamilton B. S. Co.	Archie's Store	Connolly
18171 Prescott	Paude Fondi	Frank H. Swan et als.	Eklund
43672 Costello	Samuel Needle	H. L. Slefk'n	Helford
49578 Lindemuth	James Each	R. I. Society, etc.	L. & McD.
48877 R. & R.	Mathilda Greenstein	Morr's Rosenstein	Coen
48605 B. & B.	Jacon Tannendaum	Leon Rosenfield	Owen
48186 Stiness	Steiner Mfg. Co.	Benedetto Zinno	Easton
46368 R. & R.	Samuel Wintman	John Munie	S. & S.
49760 Grim	John A. Lagerberg	E. W. Dalstrom	Clasen
49773 Walsh	Margaret Grady	Bertha Read	G. M. & H.
46307 McG. & S.	Morris Greenwald	3. & G. Sheet Metal Co.	Semonoff
45969 P. & DeP.	William Williams	Adolphus Falono	Capotosto
B. & H.	Nicola Muccino	Albert B. Emery	Collins
48828 Carty	Patrick Rock	Joseph F. Sutton	Walsh
49481 C. & O'C.	Gaetano Costanzo	Guiseppa Palaisciano	B. C.
48708 MacLeod	Mildred Allen	Howard Angell	Higgins
49837 Clifford	James Allocca	John J. Handrigian	Ousley
50055 Grimes	A. A. Sullivan	Leonardo Cor'lla	Jackvohy
50093 Frost	A. G. Porter	W. C. Ray	Remington
50126 Condon	C. H. Lord	Joseph Navoy	Pouliot
49502 Beagan	J. L. O'Rourke	Peter J. Gunn	Com. & C.

WEDNESDAY, JUNE 8, 1921

48473 Costello	William J. McKitchen	John B. Reilley C. T.	Connolly
49082 Stiness	Gatea Mfg. Co.	Franklin Auto Sup. Co.	Slocum
49735 Costello	Katherine Jacobson	Onesime Maurice	Vance
49465 R. & R.	Louis H. Rosenbaum	Louis K. Liggett Co.	L. B. & McD.

48973		Carmine Garanci	Fred Parker	Casey
49493	Atwood	Susan V. Clark	William H. Carroll	B. & B.
18059	Bowen	Margaret A. Thornley	Anna R. Handy	O'Connor
47235	McSoley	Michael J. Read	George Braum	Gorman
48386	Joslin	Mauuay Bernard	A. Gentile	Romano
48861	Johnson	D. Anerback & Sons	Horovitz Bros.	R. & R.
49683	H. E. & M.	Charles E. Meader	Robert T. Collinge	Nolan
49830	Heathman	Sam Golden	John Marzillo Co.	P. & DeP.
49850	Reichard	Philip C. Wentworth	Providence Ice Co.	Barnefield
49774	Stiness	Charles J. Jager Co.	Jesse Silva	Neves
49231	B. & B.	Carl A. Anderson	A. J. McDonald	Cawley
48905	Stiness	Foster-Smith Co.	C. A. Johnson	M. & M.
46898	Duffy	William Hughes	Herbert G. Davenport	C. C. & McC.
15054	C. & O'C.	Fortunato M. Thumos	S. M. Slaimen	C. & B.
50028	Champlin	J. H. Foglio	Tomasso Lanzi	Brand
50062	Huot	Alfred Charron	W. S. Robbins	Richmond
50105	Easton	D. Kitchen	John Broadman	McG. & S.
50115	Salisbury	Walter Simpson	Martin & Cooke	S. K. & S.
45893	P. & DeP.	John Miller	Anne Stanley	Curran

THURSDAY, JUNE 9, 1921

47742	McSoley	Joyce Bros. Co.	Raymond Kingsley	Cooney & C.
49105	Stiness	G. S. Slater Tr.	A. Luchette	Veneziale
48976	Costello	Mathias Paquin	Arthur J. Gingias	Pouliot
45815	Cooney & C	Catherine E. O'Laughlin	Axel E. Anderson	E. & A.
48393	Stiness	Maderight Mfg. Co.	Max Charron	R. & R.
44928	Easton	Santo Nanni	Domenico Malveto	P. & DeP.
49491	Stiness	Harry Smith	Charles T. Pierson	Edwards
44981	Stiness	Allen Military School	Maude M. Crawford	McMahon
18190	Finklestein	Charles Perry	Eugenio Ricci	P. & DeP.
48466	G. E. & C.	Manuel Corla	Joseph Machardo	McSoley
49742	Bowen	John J. Curtin	Joseph L. Alexander	Flynn
49736	Hicks	Nathan Sallinger	Mary Tartaglioni	McG. & S.
49855	Johnson	Crosby Steam G. & V. Co.	William H. Paine	McCarthy
48096	Dooley	Austin C. Rounds	Johan Olsson	Grim
49764	Stiness	Allen School	Cora H. Mercer	Q. & K.
48866	R. & R.	H. N. Rosenbaum	John F. Walsh	Q. & McK.
47436	Beagan	Joseph E. Garriepy	Mary F. Gladding	S. & L.
50018	Jackvony	A. Votta	Antonio Cacone	B. & B.
50036	Blodgett	Manuel Silva	Louis Silva	Neves
50140	Salisbury	Water Simpson	Charles Loeff	Farrell
50029	M. & T.	Am. National Co.	Peoples Furniture Co.	Conaty

FRIDAY, JUNE 10, 1921

47741	L. B. & McC	Albert Wine	John Meunier	P. & DeP.
49032	Osterman	Andrew Blair	Mrs. William McDonald	M. & M.
49107	Stiness	F. & A. Clothing Co.	Am. Clothing Co.	P. & DeP.
46704	W. & W.	Henry J. Boyce	Owen Skinner	McG. & S.
49485	Hicks	Nathan Sallinger	Peter Falvo	P. & DeP.
49486	C. & B.	Packard Motor Car Co.	Lawrence S. Andrews	Nolan
49490	Stiness	Cox & Co.	Hyman Weisman	Dooley
49510	Sullivan	Luigi Marelllo	R. L. Murray	
47535	Vance	Evangeline De Roza	Lewis A. Caria	J. B. L.
47536	J. B. L.	Lewis A. Cain	Evangeline DeRoza	Vance
49683	S. & S.	H. H. French & Son.	Nicola Siravo	Capotosto
49739	McG. & S.	Met. W'sale Groc. Co.	H. F. Littlejohn	
49842	Johnson	Harris Gleckman	Napoleon Lapre	Kimball
45913	R. & R.	James Haasen	George Vosilanepian	R. & R.
49829	Stiness	Young Bros.	Prov. Dye Works	Brothers
49837	Stiness	J. Levenstein	Same	Brothers
49840	Slocum	Manhattan Grocery Co.	Thomas Dorsey	Marcus
49281	Stiness	A. W. Harris Oil Co.	Archie Auto Sup. Co.	C. C. & McC.
47763	Stiness	Archie Bergeron	A. K. Mattson	McG. & S.
44932	Hicks	Nathan Sallinger	Joseph Patriarca	B. C.
49454	Stiness	Flint Dental Mfg. Co.	Hersch Dental Sup. Co.	R. & R.
48891	Stiness	Kaysler Co.	S. K. Merrill Co.	L. B. & McC.
19958	Stiness	Louis Berger	John J. Hersch	Brand
50032	M. H. & G.	Daniel T. Hagan	Am. Railway Ex. Co.	G. H. & A.
19474	Romano	Gabriele Capuano	Luciano Mancosillo	P & DeP.
49746	Romano	Vivcenzo De Tomassaro	Gennaro De Corpo	B. & B.

SUPREME COURT

Walter L. Hicks, et ux.

v

Ex. &c. No. 5427

City of Providence

Daniel H. Remington,

et al.

v

Ex. &c. No. 5428

City of Providence

OPINION

June 2, 1921

(Before Tanner, P. J., Below)

Stearns, J. These are two petitions which were brought in the Superior Court for the assessment of damages caused by the condemnation of certain land by the city of Providence for a water supply (Chap. 1278, Pub. Laws, 1915). By agreement the city of Providence paid into the registry of the Superior Court the amount of the agreed value of the land. Jury trial was waived and the two petitions were heard together to determine the title to the fund. The trial justice decided that the petitioner Hicks and his wife had the legal and equitable title to the fund. The cause is now in this court on the bill of exceptions brought by Remington et al.

There is but little difference between the parties in regard to the facts. In 1869 Ellathear Perry of Scituate, the owner of a parcel of land in Scituate and the building thereon, and her husband, John A. Perry, deeded the premises to said John A. Perry and two other trustees, their successors and assigns, in special trust "to be forever used as a free hall for any and all moral, religious, literary and scientific purposes, at any and all times when not previously engaged." The consideration of the deed, as stated therein, was the desire of the grantors to provide for the welfare of the community and the further consideration being the payment of \$531, by the Good Samaritan Circle of Scituate, an unincorporated association for benevolent purposes. The trust deed provides that the premises shall never be used for a shop, dwelling house, etc., or for any private use what-

ever; that the hall shall be free for all religious meetings, and Sunday schools upon the payment of a sum sufficient to pay the cost of fuel, light and care of the hall, and for all moral, literary and scientific purposes upon the payment of such charges as may be agreed upon by the trustees or the committee having charge of the hall and the parties wishing to use the same. It was further provided that said benevolent society might appoint a committee to take charge of the hall and the letting of the same, and in case no committee was appointed by the society, the trustees were directed to act as a committee. The receipts from the use of the hall after the payment for light, heat and care were to be used in finishing, furnishing, repairing and painting the hall. If the premises were ever used for any of the prohibited uses the trust deed provided that "the grantors or their legal representatives may cause said premises to revert back to them, said grantors and their legal representatives, but then in that case, said premises shall always be used for the purposes of a free hall as herein stated and for no other purpose whatsoever."

The hall was used by various organizations for meetings but less and less as the years passed. In 1903, John A. Perry, sole surviving trustee, conveyed the trust estate to his wife, Ellathear Perry. The grantor therein described himself as "sole trustee of a society which formerly existed, known as the Good Samaritan Circle," and stated that said society had ceased to exist: that the premises had been used for purposes in violation of the purposes of the trust and deed of May 29, 1869, and therefore revert to the original owners in accordance with the terms of said deed. Perry repaired the hall, intending apparently, to carry out the purposes of the trust. No use of the hall was made by the public, and after a year had passed the building was changed over into a dwelling house and has since been rented by different tenants.

John A. Perry died in 1904. His wife,

Ellathear Perry, died in 1905, and by the terms of her will her three children, Adelbert, Nancy and Ezra, became entitled to the real estate in question. In 1910, Adelbert and in 1914 Nancy by deed conveyed their several undivided interests to Ezra who later in 1914 conveyed by warranty deed to one Frank Crossley. May 14, 1915, Crossley by quit-claim deed conveyed the premises to the petitioner Hicks, who now claims the fund as the owner of the real estate, which was condemned, both by virtue of his deed and by adverse possession. The petitioners, Remington et al claim the fund as the surviving members of the Good Samaritan Circle. The circle has not held a meeting since 1898 and is now inactive.

The trial justice found as a fact that at the time of the conveyance by the trustee, Perry, in 1903, the trust had not terminated by reason of the use of the hall in any of the ways prohibited. The court decided that the terms of the deed, the recording of the deed and the conversion of the hall into a private dwelling, established an open and notorious renudiation of the trust by the trustee, which fact must have been known to all the cestuis who were then required to assert their equitable rights, and that the statute (Chap. 796, Pub. Laws) began to run from the time such knowledge was brought home to the cestuis: if this position was untenable, the trial court held that since the conveyance to Ellathear Perry in 1903 the legal title of said land had been held adversely by her successors in title on the principle that a person who buys from a trustee, even with knowledge of the trust, may hold adversely. Without discussing this proposition of law on the question whether it is applicable to the case at bar, we think the decision of the Superior Court was erroneous. The trial justice does not state whom he finds to be the beneficiaries but apparently accepts the claim of counsel that the cestuis are the surviving members of the Good Samaritan Circle. But there is no such limitation in the term of the trust

deed. The association is authorized to appoint a committee to take charge of the hall and the renting thereof. The income is to be applied for the repair and maintenance of the hall. No other fund is provided for to carry out the trust. If the society fails to appoint a committee, the trustees are to act as a committee, but neither trustees nor committee are to receive any compensation. The creators of the trust lived in the village of Richmond, which is a part of the town of Scituate. The enjoyment of the use of the trust estate, of necessity, was limited by its location in the village of Richmond, but we find nothing in the deed which shows any intention to limit the right to use the hall to the inhabitants of either Richmond or Scituate. The provision that the hall should be free for all religious meetings and for all moral, literary and scientific purposes is very broad and shows the intention of the donors to create a trust for the benefit not only of the local community in which they lived, but for the public at large.

Our conclusion is that this was a charitable trust for the benefit of the public. The statute does not apply to such a trust. The petitioners could not and have not acquired title by adverse possession against the public. *Simmons v. Cornell*, 1 R. I. 519; *Almy v. Church*, 18 R. I. 182.

Even if the trust should be held to be limited for the benefit of the inhabitants of Richmond village or the town of Scituate only, the petitioners Hicks and wife have not acquired a title by adverse possession and the case of *Mowry v. City of Providence*, 10 R. I. 52, cited by petitioners is consequently not an authority in support of their claim. Ellathear Perry, by the conveyance from her husband, the trustee, took the legal title subject to the trust. The conveyance was made by the trustee without legal right. Even if the terms of the trust had been broken, the original donor under the provisions of the deed of trust, upon a reconveyance made to her would have taken the legal title subject to the

trust. That there was no intention at first on the part of Ellathear Perry to repudiate the trust, seems to be plain from the fact that the hall was repaired and kept for a time for public use. The change of the hall into a dwelling house and the use of such, without any change thereafter in the legal title, was a breach of trust but not of such a character as to cause the statute of adverse possession to operate. The children at the death of their mother acquired no greater right by inheritance than the mother had. The conveyance by Adelbert, the son, in 1910, and by Nancy, the daughter, in 1914, to the son, Ezra, did not alter the situation. The parties were in possession under a legal title which was subject to a trust and were not purchasers for a valuable consideration without notice. Being in possession under a legal title, which was not adverse, they can not claim to hold the possession under another title which is adverse. *Nichols v. Reynolds*, 1 R. I. 30; *Searle v. Laraway*, 27 R. I. 557.

In this case there is no purchaser for value without notice. The first conveyance to a stranger to the trust was made to Crossley in February, 1914, but both he and Hicks had notice of the trust and each took title subject to the trust.

Our conclusion is that neither of the petitioners is entitled to the fund, which belongs to the public and in the circumstances must be administered by application of the cy pres doctrine.

The exceptions of Remington et al are sustained and the case is remitted to the Superior Court for further proceedings.

Sweeney, J. dissents on the ground that the property located in the village of Richmond, in the town of Scituate, was conveyed to trustees to be used for specified and limited purposes: that the surviving trustee openly and publicly repudiated the trust, and thereafter, he and his successors in title to said property, including Mr. Hicks, claimed to hold the same as their own, discharged from said trust; that such repudiation and

claim was known to the cestuis que trust, and they neglected to enforce their equitable rights to use said property for said trust purposes, until the statute of possession has given a good and rightful title to the claimant, Hicks and wife, and bars the cestuis que trust from now enforcing any claim to the use of said property.

Vincent, J. concurs with Sweeney, J. in his dissent.

For Hicks: Huddy, Emerson & Moulton
For Remington: John P. Beagan
For City of Providence: Elmer S. Chace

SUPREME COURT

Charles Camire }
v. } Ex. &c. No. 5466
Emma Camire }

OPINION

June 1, 1921

(Before Judge Hahn Below)

Sweetland, C. J. This is a petition for divorce from the bond of marriage on the ground that the parties have lived separately and apart for more than ten years immediately preceding the filing of the petition.

Upon the suggestion that the respondent was confined in an insane hospital as a person of unsound mind the Superior Court appointed a guardian ad litem for the respondent to protect her rights in the course of this proceeding.

The cause was heard before a justice of the Superior Court and at the conclusion of the evidence said justice found that the parties had lived separate and apart for ten years before the petition was filed; but that during the last two and one-half years of that period the respondent had been insane and confined in the Taunton Hospital for the Insane. The justice then denied the petition on the ground that the parties had not for ten years been living separate and apart within the meaning and intent of the statute. To this decision the petitioner excepted and has brought the exception before us.

The statutory provision relating to the ground of divorce relied on by the petitioner is contained in Section 3, Chapter

247, General Laws 1909, and is as follows: "Whenever in the trial of any petition for divorce from the bond of marriage, it shall be alleged in the petition that the parties have lived separate and apart from each other for the space of at least ten years, the court may in its discretion enter a decree divorcing the parties from the bond of marriage, and may make provision for alimony."

If said justice had denied the petition in the exercise of the discretion given by the foregoing section, we would not review his decision unless in some way it was made to appear clearly that his action was an abuse of the discretion conferred. The justice, however, based his decision upon a construction of the statute and his act on thus presents a question of law reviewable upon the petitioner's exception.

The petitioner urges that the statutory provision in question is without qualification and does not make the granting of a divorce upon this ground dependent upon whether the living apart for ten years is voluntary or involuntary on the part of either or both of the parties. In reply to this contention it could be said that the statutory provision making extreme cruelty and adultery grounds for divorce are equally unqualified, yet the proof of acts of extreme cruelty while a respondent is insane would not warrant the entry of a decree for divorce; and by the weight of authority acts of illicit sexual intercourse committed by a respondent when insane, by either an insane husband or an insane wife, do not constitute a cause for divorce in favor of a petitioning spouse.

In the statutory provision in question the intent of the General Assembly appears that when a husband and wife have lived separate and apart for ten years there is little prospect of reconciliation between them and that then, after such ample time for reconciliation has been given, either should be allowed to appeal to the discretion of a justice of the Superior Court, asking that they be freed from a bond which is no longer

beneficial to them or to society. If, upon hearing the evidence, the trial court finds that although he forces the parties to continue the relation of husband and wife they will probably persist in living apart, without attempts at reconciliation, such finding must be an important consideration in passing upon a petition of this kind. From the view which we have taken of the nature of the proceedings under this statutory provision it follows that to warrant granting a divorce on this ground, the respondent, throughout the period of ten years during which the parties have lived separate and apart, must have been of normal mental capacity in order to understand the relations existing between the parties, to form a rational desire to end the separation, and to take action regarding a reconciliation. Unless a respondent is capable of so acting we do not think that under the statute such circumstances of living "separate and apart" are presented as would give a justice of the Superior Court jurisdiction to exercise his discretion and grant a divorce.

The decision of said justice was without error.

The exception of the petitioner is overruled. The case is remitted to the Superior Court for further proceedings.

For Petitioner: Thomas F. Vance.

For Respondent: Lawrence F. Nolan.

SUPREME COURT

Alfred Daignault

v.

Joseph E. Wooliscroft

} Eq. No. 513

OPINION

May 31, 1921

(Before Justice Hahn Below)

Sweeney, J. This is a bill in equity to enforce the specific performance of a written agreement to convey certain real estate. After a hearing in the Superior Court upon bill, answer, issues of fact, and oral proof, a final decree was entered dismissing the bill and the complainant duly brought the cause to

this court upon his claim of appeal from the entry of said final decree.

The bill of complaint avers that the respondent, by his agent thereunto duly authorized, signed a written agreement to sell respondent's real estate described in said agreement to the complainant, and that the respondent refuses to make the conveyance, although the complainant is ready to comply with the terms of agreement. The answer denies that said agent was duly authorized to sign the agreement to sell respondent's real estate. The issue of fact is, Was the agent authorized to bind the respondent to sell his real estate? It was admitted that the authority of the agent was not in writing, and the trial justice found that the oral authority granted to the agent to sell the real estate was not binding upon the respondent. In *Sholovitz v. Noorigian*, 42 R. I. 282, on page 286, this court held: "By the provision of the statute of frauds in a few jurisdictions it is required that an agent signing such promise, agreement, or note or memorandum thereof, shall be one acting under written authority. There is no such requirement under our statute. In the absence of a statutory provision to the contrary the ordinary rules of the law of agency prevail. Such authorization may be by parol; and the authority to make a contract for the sale of real estate confers authority to sign the written note of memorandum which renders such contract effective and binding."

In 25 Ruling Case Law, Sec. 324, the principal is stated: "Though the view has been taken that the authorization of an agent to enter into a contract required by the statute to be in writing must be in writing, according to the great weight of authority, where the statute merely requires that the contract be signed by the party to be charged or his duly or lawfully authorized agent, it is not necessary that the agent's authority be conferred by writing." See also 20 Cyc. 276; *Preble v. Higgins*, 43 R. I. 10.

Upon the testimony in this cause, and

the law is herein stated, said agent was duly authorized to sign said agreement, and the complainant is entitled to the relief prayed for.

The complainant's appeal is sustained and the decree of the Superior Court is reversed. The parties may present to this court a form of decree in accordance with this opinion, June 6, 1921, at nine o'clock a. m., Standard time.

For Complainant: E. J. Daignault.
For Respondent: Walling & Walling.

(When the above-named case was argued before Judge Hahn in the Superior Court the case of *Sholovitz v. Noorigian* was not cited by counsel on either side. Counsel for the complainant discovered the case, however, before it reached the Supreme Court for hearing. Judge Hahn, in the Superior Court, according to the brief submitted by counsel for the complainant, relied on the case of *Bourne v. Campbell*, 21 R. I. 490. The case of *Sholovitz v. Noorigian*, which the Supreme Court now cites with approval, is comparatively recent. Counsel argued that the *Bourne* case says an agent without authority in writing signed by his principal cannot bind his principal by a memorandum in writing under the statute of frauds, while the *Sholovitz* case says the agent can bind his principal under such circumstances.)
—Ed.

SUPREME COURT

Margaret Fagan }
v. } Ex. &c. No. 3449.
Rhode Island Co. }

RESCRIPT.

June 1, 1921.

This case is now before the court on the defendant's motion to remit for judgment.

The record shows that March 15, 1905, the Appellate Division of the Supreme Court filed its opinion sustaining the defendant's petition for a new trial on the ground that the verdict was against the evidence and ordered the case remitted to the Common Pleas Division with direction to enter judgment for the defendant.

No motion for reargument was filed by the plaintiff within three days after de-

cision, as permitted by Rule 35 of the then Rules of Practice in the Supreme Court, 22 R. I. 111, but five days thereafter the plaintiff filed two motions attacking the jurisdiction of the court to order judgment entered for the defendant. Leave of court was not granted for the filing of these motions and no action has ever been taken upon them. The papers in the case remained on file in the office of the clerk of the Appellate Division of the Supreme Court at the time of the taking effect of "The Court and Practice Act," July 17, 1905.

Section 1252 of said act provides, among other things, that "in any case * * * wherein, when this act takes effect, any finding, order, judgment, or decree shall have been made or entered by the Appellate Division of the Supreme Court * * * setting aside * * * any verdict * * * or allowing any * * * petition for new trial * * * in, by, or from the Common Pleas Division of the Supreme Court, * * * such finding, order, judgment, or decree shall be had or made, in the Superior Court * * * at the time when the same would but for this act have been lawfully had, made, entered, or re-entered in such Common Pleas Division of the Supreme Court * * * under such finding, order, judgment, or decree; and thereupon such Superior Court * * * shall have jurisdiction of such case, and shall proceed therein as if the same had been originally directed to be brought entered, or re-entered before it under the provisions of this act."

December, 5, 1919, the death of the plaintiff was suggested in this court by her attorney of record. Notice of this motion to dismiss has been served upon said attorney, and also upon the son of said plaintiff whose injuries were the basis of plaintiff's suit for loss of his services. At the hearing upon the motion, it was stated by the defendant's attorney that no administrator had been appointed upon the estate of said deceased, and no person appeared to object to the granting of said motion.

The case having been heard and de-

cided in the Appellate Division of the Supreme Court, and no motion for re-argument having been filed within the time limited by the rules of the court and the order for judgment being in full force and effect, the defendant is entitled to have the benefit of the order.

The defendant's motion is granted and the case is remitted to the Superior Court with direction to enter judgment for the defendant as of the 17th day of July, 1905.

For Plaintiff: No attorney.

For Defendant: Clifford Whipple.

SUPERIOR COURT

Providence, Sc.

State of Rhode Island

vs.

George Riendeau &
Lucina Riendeau

Ind. No. 10228

RESCRIPT

Hahn, J. After verdict of guilty in the above entitled indictment, the defendant, George Riendeau, filed his motion for a new trial based upon the following grounds:

1. That said verdict is against the evidence.
2. That said verdict is against the law.
3. That said verdict is against the evidence, and the law and the weight thereof.
4. That the defendants have discovered new material evidence which they could not have discovered by the exercise of due and reasonable care on their part before the trial of said cause.

The fourth ground was not urged at the hearing.

This was an indictment for murder in which the defendants, George Riendeau and Lucina Riendeau, were indicted for the murder on May 17th, 1919, of their infant son, George Riendeau, Jr. Said infant was, at the time of said murder, a trifle over two months of age.

The indictment sets out that the murder was committed by giving to George Riendeau, Jr., Paris green.

After a trial lasting five days, the jury found the defendant, George Riendeau, guilty and the defendant, Lucina Riendeau, not guilty.

The undisputed evidence was that the child, George Riendeau, Jr., was conceived some time before the marriage of the defendants and upon complaint being made to the Overseer of the Poor, bastardy proceedings were instituted against George Riendeau, and through these proceedings he agreed to marry and did marry the defendant, Lucina. After the birth of George, Jr., the parents were living unhappily in an ill-kept home and it seems to have been the desire of both defendants that Lucina should obtain employment. The time necessary to care for the infant, George, Jr., rendered it impossible for Lucina Riendeau to leave the home and take up employment, and it also appeared that neither defendant had any affection for the infant. In fact, he appeared to stand in the way of carrying out the desires of both of his parents. There was abundant evidence that he was unwelcome, ill-treated and neglected in his home and received little or no attention with regard to cleanliness, except such as was received from neighbors and relatives. It also appeared that on one or more occasions the defendant, George Riendeau said something about Paris green in relation to the infant. George Riendeau testified that it was jokingly said; other witnesses testified that it was said in earnest.

On Saturday, May 17, 1919, the day of the murder, the defendant, George Riendeau, left his home and, as he claims, did not return there until he had been arrested and was brought there by the officer some time late in the afternoon. The defendant Lucina Riendeau, does not testify that the husband was there during the day, but says that when he went in the morning she told him to buy a box of matches and when she got in after a short visit in the af-

ternoon, she found a box of matches there.

On the afternoon of May 17, about 5 o'clock, Charles H. French, Medical Examiner of Central Falls, was by the police called to the home of the defendants and examined the body of George Riendeau, Jr. He stated there was watery fluid coming from the nose; that it had a greenish stain; that there were greenish stains on the dress of the child; that on the following day he performed an autopsy and found the child well nourished; that he examined the various organs; that in the stomach there were greenish stains; that in his opinion death was caused by arsenical poisoning; that there was in the various organs almost one-half grain of arsenic; that a quarter of a grain would be fatal to a child of the age of two months. Various of the organs taken from the body and sundry other articles were by him turned over to Mr. Gage.

Stephen M. Gage, chemist for the State Board of Health, who made the analysis, stated that Paris green was a compound of copper and arsenic known as copper aceto-arsenite. He found arsenic on various articles delivered to him by Dr. French; in a nursing bottle, on a blanket, on a piece of cloth, and in the internal organs of the child. He noticed greenish stains in patches in the stomach and a reddening of the mucous membrane of the stomach, and an apparent irritation of the coating of the stomach. The entire stomach contained .324 of a grain of metallic arsenic. In the intestine he found .15 of a grain; in the kidney he found .02 of a grain; in the three organs, .494 of a grain.

From the testimony, eliminating other causes, the condition of the organs of the child's body having been normal, the jury were justified in finding in accordance with the opinion of Dr. French that the death was caused by Paris green.

At the time of the arrest of defendant, George Riendeau, on May 17 he was taken into custody and conducted to the police station. While at the station he endeavored to conceal or make

way with a bottle (State's Exhibit 1), which, after a struggle, the officer obtained from him. This bottle, upon analysis, was found to contain Paris green. He, at the time, explained the possession of this bottle, telling the police that he found it on a dump. At the trial he testified that he didn't know where it came from or how it came into his possession.

A consideration of the entire evidence leaves no doubt as to the fact that the child came to its death through the act of one or both of its parents. The jury by acquitting the defendant, Lucina, must have found that beyond a reasonable doubt defendant, George Riendeau, poisoned the child, and that the child came to its death through Paris green administered to it by the defendant, George Riendeau. While no person saw this defendant administer Paris green to the child, the fact that the child was unwelcome to him, that he had spoken of Paris green in connection with it, that its death was caused by

Paris green, and that upon his arrest he had on his person and tried to destroy or conceal a bottle containing Paris green, that during the day of the child's death he had been told to get some matches and matches were found in the house, are all facts corroborative of the State's theory of his guilt.

It is not a case in which the evidence overwhelmingly points to the individual guilt of this defendant, although it leaves no doubt as to the fact that the death was caused by one or both of the defendants.

The jury considered the case carefully, heard the evidence and saw the witnesses, including both defendants. It cannot be said that there was no sufficient evidence upon which to base the conviction of George Riendeau.

Motion for new trial denied.

For the State: A. A. Capotosto

For George Riendeau: Albert B. West
and Samson Nathanson

The New Act Governing Appeals

The act passed at the last session of the General Assembly, designed to simplify the procedure on appeal, will go into effect September 19, 1921, but will not apply to a case in which the verdict, decision or judgment or decree entered before the act goes into effect.

Under the present practice, the carrying of a case to the Supreme Court is one of the most difficult and burdensome things Rhode Island lawyers are called upon to do, for there are pitfalls all along the way and failure to take any step within the prescribed time usually is fatal to the appeal. The new act, for which the Bar Association and Alexander L. Churchill are largely responsible, attempts to entirely eliminate all such technicalities and it is hoped that the new law will prove satisfactory.

For the benefit of lawyers who have not yet examined the new act, the Law Record herewith presents an analysis of the main differences between the old and the new, the case cited being those which govern under the present practice and which are sought to be overcome by the new act.

The old 50-day limitation for filing a bill of exceptions is removed, the court may extend the time, or fix a new time for filing a bill of exceptions, etc., if the time for filing has expired.

Jackvony v. Colaluca, 29 R. I. 441;
McLean v. Wheelwright, 31, R. I. 562;
Allen & Reed v. Russell, 33 R. I. 422

If decision has ripened into judgment, the court may in its discretion, set aside the judgment.

The Supreme Court is definitely

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Joseph H. Clark

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given power to allow amendments to a bill of exceptions or transcript.

Under the new law the transcript and bill of exceptions may be submitted for allowance to any judge, if the judge who heard the cause is not available.

Matteson v. Smith. 30 R. I. 198.

Paull v. Paull, 30 R. I. 253.

Hereafter the failure of a judge to act on a bill of exceptions within 20 days, and the failure of the excepting party to take some steps within ten days thereafter will not be fatal (*Hartley v. R. I. Co.* 28 R. I. 157), for following what has always been the law in

regard to allowance of a transcript of testimony in an equity case, the revisers have provided that under such circumstances the clerk of the Superior Court must certify the case to the Supreme Court within 20 days. Thereupon, the case is ready for hearing in the Supreme Court on the question of the truth of the exceptions and transcript.

The new statute would seem to eliminate petitions under Rule 13 of the Rules of Practice of the Supreme Court. (*Carr v. Cranston Print Works*, 40 R. I. 376).

The procedure in equity causes and in petitions under the Workmen's Compensation Act have been similarly modified.

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Rhode Island Law Record

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SUBSCRIPTION PRICE, \$18 A YEAR

No. 5

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
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Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

AT THE EDITOR'S DESK

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THE BUSINESS HEADS OF TOMORROW are the youthful heads of today. We are for this reason particularly interested in the banking business of young men, and welcome their account no matter how small with the same pleasure that we have in handling the business of older men who have already arrived.

National Exchange Bank

63 WESTMINSTER STREET

JURY CALENDAR, WEEK OF JUNE 27

MONDAY, JUNE 27, 1921

47383	Brand	Carmine Amelio	Pasquale Farnolo	Collins
48315	Gunning	Edgar D. Whipple	Globe Indemnity Co.	G. E. & C.
45276	O'Connor	Harvey Champagne	Frederick P. Drowne	McSoley
45210	McSoley	Frederick P. Drowne	Harvey Champagne	O'Connor
47626	Gardner	Valentine A. Fres	Edwin E. Anthony	Marcus
49365	Stiness	Eagle Cornice Co.	Vincenzo J. Oddo	P. & DeP.
48792	P. & DeP.	Samuel Bova	Dosittie Brandel	Collins
45608	Q. & McK.	Angelina Rossi	Rhode Island Co.	Sweeney
45609	Q. & McK.	Josephine Rossi	Same	Sweeney
45610	O. & McK.	Same	Same	Sweeney
45611	Q. & McK.	Louis Rossi	Same	Sweeney
49648	B. & B.	Bay State Fur Co.	Domenico Melazzo	Flvnn
49649	B. & B.	Same	Maggie Cavalieri	P. & DeP.
49137	Com. & C.	Colonial Dress Co.	Cherry & Webb	G. H. & A.
48417	LeCount	Rosa Shatkin	Louis Seitman	Helford
49777	G. M. & H.	Mitchell Mil. Boy School	George K. Moore	Harris
46447	Easton	Merrick T. Walling	Isabella Mathewson	S. & L.
46448	Easton	Arabella Walling	Same	S. & L.
45018	W. & G.-B.	Frank E. Tingley	Joseph P. Jacques	Churchill
48478	P. & DeP.	Antonio G. Fidanza	Frank Paparelli	Gunning
48477	P. & DeP.	Angelo Mardalillo	Same	Gunning
50762	C. & H.	Mary L. Bazinet	Frederick A. Ballou	B. S. & L.
41468	Chaffee	Wm. C. Johnson & Co.	Crescent Braid Co.	G. E. & C.

TUESDAY, JUNE 28, 1921

49331	Johnson	L. Dannenbaum & Son	N.Y., N.H. & H. RR. Co.	Phillips
47019	T. & C.	Sarah A. Dixon	George Levine	McCarthy
46210	McKenna	Charles H. Mason	Ernest Carrett	Marcus
49511	Stiness	I. Fider	M. Sherman	Slocum
49525	Heathman	Joseph Szydlowski	John McKelb	F. & H.
49612	B. & B.	David Korn	Harold B. Congdon	Gunning
45676	T. & C.	Amelia LaVoie	Thomas K. Fisher	P. & DeP.
48483	Stiness	L. & R. Co.	Crescent Braid Co.	G. E. & C.
48723	Baker	George Litchman	A. L. Sayles & Sons Co.	S. K. & S.
43226	F. & H.	Mary J. Benson	Rhode Island Co.	Williams
48313	M. & T.	James D. Whitaker	R. C. N. Mfg. Co.	Corcoran
49910	Colton	Ruth A. Smith	Arthur C. Stone	Flynn
49031	B. & B.	Seaboard Flour Co.	D. DiLuglio	P. & DeP.
49676	W. & G.	Malvern E. Gleason	Hope Mill Supply Co.	Flynn
49215	Alexander	Mary A. Flanagan	Frank H. Swan et als.	Sweeney
50116	Joslin	Ruth E. Collins	John F. McCormick	

WEDNESDAY, JUNE 29, 1921

36222	D. & D.	Mary O'Reilly	Helen Merriman	G. H. & A.
47291	Semonoff	Mary Murdock	Adolph E. Johnson	McG. & S.
45517	P. & DeP.	Andrea Sontangini	Concetta Marrocco	Cianciarulo
49512	Stiness	John C. Cahir	Libby Whetstone & Co.	P. & S.
49592	L. & McD.	Madeline McCauley	Walter J. Hearn	W. & G.
46676	W. C. & C.	Samuel Waldman	Albert Eliss	Semonoff
48633	F. & H.	Louise Redelaferger	Zenas W. Bliss et als.	Whipple
44322	McSoley	Raymond L. Pike	Samuel P. Colt	Harris—O'D
38810	P. & DeP.	Albert Stuckey	Rhode Island Co.	Sweeney
38809	P. & DeP.	Sarah Stuckey	Same	Sweeney
49213	LeCount	Edward B. Jenkins	Llyod M. Sweet	Chase—H.
50275	O'S G. & C.	Peter E. Rokas	Providence Gas Co.	S. K. & S.
43101	Knauer	Patrick F. Mulvey	Thomas H. Early Co.	McG. & S.
43102	Knauer	Abbie F. Mulvey	Same	McG. & S.
49938	Veneziale	Silvia Boragine	Elanterio San Padre	P. & DeP.
49168	Easton	Mariano Teolia	Eugenio Mascatelli	P. & DeP.

THURSDAY, JUNE 30, 1921

49966	Marcus	Gussie Fried	Simon F. Caswell	O. & McK.
47121	Stiness	Solomon Mossbacher	Martin Lippman	R. & R.
49618	Morrissey	George D. Kelley	Frank H. Swan et als.	Sweeney
49670	Stiness	Chase Co.	New Idea Mfg. Co.	L. R. & McC.
47943	Gillrain	Daniel J. Higgins	General Fire Extr. Co.	G. H. & A.
46435	G. M. & H.	William A. Monroe	C. Perry White	Wildes
44676	P. & DeP.	Vincenzo Manfredo	Teresa D'Agostino	Jackovny
48795	Enos	Frank Coria	Frank Lima	Collins
48423	Knauer	Ernest E. Henrickson	Joseph Gannelli	Clifford
44667	Smith	Charles Crawley	John F. Donnelly	McCauley
44668	Smith	Alva Crawley	Same	McCauley
49267	Joslin	Am. Italian Cheese Co.	John Marzullo	P. & DeP.
50005	Brennan	Julian Wojciechowski	Andrew H. Di Orio	Dooley
45409	P. & DeP.	Robert Steen	Lucius N. Newell	L. B. & McC.
50261	C. & H.	Mary L. Bazinet	Nicola Cappelli	R. S. & L.
49691	Slocum	Israel Chernick	Arthur Berube	W. & G.

FRIDAY, JULY 1, 1921

48633	F. & H.	Louise Redelsferger	Zenas W. Bliss et als.	Whipple
49000	Jenks	Le Bon B. & D. Works	Providence Dye Works	Brothers
45784	M. & T.	Edward J. McGuirk	Local Union 476, etc.	Rosenfeld

SUPREME COURT

Eleanor Knagenhjelm

vs.

R. I. Hospital Trust Co.

Adr. d. b. n. c. t. a. et al.

Equity
No. 516

OPINION

June 20, 1921

(Before Tanner, P. J., Below)

STEARNS, J. This is a suit in equity brought by the complainant, a citizen of Norway, against the respondent corporation as administrator d. b. n. c. t. a. of the estate of Theodore M. Davis and as trustee under a deed of trust made by Davis to the respondent.

The bill asserts the right of complainant to 422 shares or interests in a corporation, Keweenaw Land Association, Limited, each in the name of Theodore M. Davis, Trustee, which came into the possession of respondent as administrator after the death of Mr. Davis, and the relief sought is that complainant may be declared to be the owner of said certificates at the death of Mr. Davis, and entitled to receive all income derived therefrom since that time and that respondent be required to transfer and deliver to complainant said certificates and to account for all dividends and profits received, with interest. Complainant bases her claim upon a written declaration of trust, also upon a subsequent deed of assignment made by Mr. Davis.

In its answer the respondent denies the right of complainant to the stock, and claims the right to hold the same as a part of the remainder of the personal estate bequeathed to the respondent as trustee, by said Davis.

The cause was heard by a justice of the Superior Court on bill, answer, replication and proof and a final decree was entered in said court awarding the complainant the 422 interests and the dividends and interest received since the death of Mr. Davis; the respondent, it was held, was entitled to have counsel fees paid out of the fund.

From this final decree the respondent and complainant have appealed. The ef-

fect of the respondent's appeal is to raise the question of the right of the complainant to relief as prayed, and the effect of the cross appeal of the complainant is to raise the question of the right of the respondent to counsel fees out of the fund and of the amount of interest to be allowed by said final decree. By agreement of counsel the two appeals were heard together and the questions raised thereby will be considered together.

The essential facts are not in dispute. Mr. Davis was a man of large wealth, who had retired from the active practice of the law and settled in Newport. He was married, but had no children. For many years he had been the friend of complainant's father and had been associated with him at different times in business and legal matters. The complainant, whose name before marriage was Eleanor S. Wilson, from her early childhood had been a particular favorite of Mr. Davis. So strong was his affection for the child, that he sought the consent of her parents to adopt her legally as his daughter. Complainant's parents would not consent, but did allow their daughter to spend her summers at Newport and to travel extensively with Mr. Davis and his family. Mr. Davis was generous in his gifts to his relatives and friends, and enjoyed giving freely and often to those for whom he cared.

In 1894 the complainant received a proposal of marriage from Mr. Knagenhjelm, who at the time was in the diplomatic service of Norway and a temporary resident of this country. Under the rules of his government, Mr. K. was not permitted to marry without a substantial independent income in addition to his salary. In order that this obstacle to the marriage might be removed, Mr. Davis, after an interview with Mr. K., in Newport, in July 1895, told complainant that he had arranged everything with Mr. K. and that she should have \$5000 a year, and the engagement was then at once announced by Mr. Davis, at a dinner in his own house. On

the same day, or shortly thereafter, Mr. Davis, at his residence in Newport, signed a declaration of trust in the presence of a witness. The document, which is in the handwriting of Mr. Davis, is as follows:

"Newport, R. I., July 16, 1895.

The four hundred and ninety-seven (497) 'Interests in the capital of the Keweenaw Association, Limited,' which stands in my name as Trustee, and Certificate for which I herewith enclosed, I hereby declare to be held in trust for Eleanor S. Wilson, and in case of my death, she surviving me, are to be delivered to her as her property, and duly transferred to her, or as she may direct.

THEO. M. DAVIS.

Witness,
John R. Proctor, Jr."

On the same day he indorsed in blank two certificates in the association, standing in his name as trustee, numbered A 77 and A 78, for 100 and 387 interests, respectively, and placed them together with the declaration of trust in an envelope upon which he wrote the following inscription: "497 shares of 'interests in the capital of the Keweenaw Association, Limited,' held in trust for Eleanor S. Wilson, daughter of Nath. Wilson, Esq., of Washington, D. C. To be delivered to her, she surviving my death. Theo. M. Davis." This envelope was placed and kept in Mr. Davis's safe deposit in the Newport Trust Company, where it was found shortly before his death. At some time, which has not been definitely fixed, the word "ninety" in the declaration was scratched out and the words, "Four hundred forty-seven, 447, T. M. Davis," were written by Mr. Davis above and before the word "interests" and on the envelope the number "497" was scratched out and the number "447" was written above it.

Complainant was married early in September, 1895. At the time of the wedding Mr. Davis told complainant he had made the trust for her benefit, that it was his wedding present to her and that the Keweenaw interests he held in trust for her were in his safe deposit

box in Newport. Mrs. Knagenhjelm testifies that often thereafter Mr. Davis on different occasions told her not to worry over the future, that he had created a trust in these interests for her and also on several occasions he referred to the trust in his letters to her. He always referred to the number of interests as 500, and complainant did not know that the number was reduced by him to 422 interests or his reason for doing this.

Two of the dividends on the interests paid after the date of the marriage were deposited by Mr. D. in complainant's bank account. Complainant and her husband then went abroad to live and thereafter the dividends were deposited to Mr. Davis's own account and the fact that the dividends were from the trust interests was noted in the deposit book. Mr. Davis sent to complainant regularly \$5000 a year and subsequently increased the amount of the allowance to \$10,000. Complainant was always told that the dividends were taken into consideration in making the allowance. Mr. Davis made further provision for complainant in his will and so informed her, but she was always made to understand that the provision for the Keweenaw interests was separate and apart and was additional to any benefit she was to receive by the terms of the will.

In 1902, Mr. K. was seriously ill and as a consequence was unable to continue in the diplomatic service. By the advice of Mr. Davis, and at his expense, complainant made a change of residence in the hope that her husband would be benefited thereby. Mr. K. did not improve, but failed steadily in health, and finally died in 1907. Mr. Davis during this period continued to visit the family whenever he went abroad and at his suggestion complainant incurred many additional expenses, payment for which was made by Mr. Davis. In October, 1902, Mr. Davis, at the office of his attorney, Mr. Parsons, in New York city, signed and acknowledged a deed of assignment whereby for the consideration, as stated therein, of his love and affec-

tion for Mrs. Eleanor K. and of one dollar to him paid by her, he gave and presented to her "Five hundred (500) rights of the Keweenaw Association, Limited, now standing in my name in trust for her." After executing this deed, Mr. Davis took it in his hand, stepped out of his attorney's private office into the outer office and there delivered it to the son and legal associate of his attorney. The son placed the deed in an envelope which had been used to contain Mr. Davis's wills and which then bore the indorsement, "Will of Theodore M. Davis and codicils," and wrote on the envelope, "Also assignment of certificate of T. M. D." and placed the envelope with its contents in the safe of the office, where it remained until after the death of Mr. Davis in 1915.

Mr. Davis told complainant when he saw her again in 1903 that he had given her the 500 interests and that his attorney, Mr. Parsons, had the papers and thereafter when speaking to her in regard to the interests he referred to the interests as hers, rather than as he had previously done, as held by him in trust for her.

This deed, which was made seven years after the declaration of trust, by its terms affirms the existence of the trust and was intended to enlarge and not decrease the interest of the beneficiary in the trust estate.

Respondent claims that this assignment is invalid, as the instrument purports to make a gift; and that the action of Mr. Davis in delivering the deed to the son of his attorney, did not constitute a legal delivery for the benefit of complainant. It is not necessary to consider this deed of assignment in detail or its legal effect, as we are of the opinion that prior to its execution Mr. Davis had created a valid trust of the interests, by the provisions of which the complainant is now entitled to the relief prayed for.

On July 16, 1895, (the date of the trust instrument), Mr. Davis owned a large number of interests of the association which stood in his name individ-

ually; in addition thereto he had one certificate for 397 interests, one for 100 interests and two each for 25 interests, a total of 547 interests, which stood in the name of "Theodore M. Davis, Trustee." The certificates for 397 and 100 interests were indorsed in blank on July 16, 1895, and placed in the envelope for the trust for 497 interests. On April 7, 1896, Mr. Davis withdrew from the envelope and transferred to the father of complainant the certificate for 100 interests, and complainant's father later transferred the same to complainant. The suggestion is made, and it is probable, that at this time Mr. Davis placed the two trust certificates, each for 25 interests, in the envelope as a partial replacement of the 100 interest certificate which had been withdrawn and at the same time changed the statement of the number of shares in the trust instrument and on the envelope from 497 to 447. In 1908 the Keweenaw Association, Limited, was reorganized, new certificates were issued and to Mr. Davis, in lieu of the 447 interests then standing in his name as trustee, was issued a new certificate to him as trustee for 447 interests. In 1909, at the request of Mr. Davis, in exchange for said certificate for 447 interests, the association issued to Mr. Davis certificates number B108 for 397 interests, number B109 for 25 interests and a third certificate for 25 interests. Said new certificates were issued in the name of Mr. Davis, as trustee, and were the only certificates so issued then outstanding. In 1912, Mr. Davis withdrew the said third certificate for 25 interests from the envelope and transferred the same to Daniel Jones, his butler. This last conveyance was made for the reason, as given by a witness, that Mr. Davis at the request of Jones, had invested some of his savings in the stock of the association. The 422 interests remaining in the envelope are now claimed by complainant, who, without prejudice to her legal rights, waives claim to the 75 shares which have been taken from the original 497 interests, because, as she states, on ac-

count of Mr. Davis's great kindness and generosity to her, she does not care to question the legality of his acts, nor to seek the contribution from his estate.

The respondent's contention is that in order to distinguish a voluntary trust on the one hand and an intent or attempt to make a testamentary disposition on the other hand, there must be some transfer of present interest to the donee; that the so-called declaration of trust did not transfer any present beneficial interest to Mrs. K., but was an attempt to make a gift to take effect upon the death of the donor and consequently was void because it was not executed as a will; that the vital question in regard to the declaration of trust is not the intent of Mr. Davis, but whether or not he did enough to "execute" the trust.

Respondent has cited numerous cases from different jurisdictions showing that the authorities are not uniform in the requirements held to be necessary to establish a voluntary trust. Without attempting to discuss or to differentiate the different decisions we think the law as stated in *Ray v. Simmons*, Admr., 11 R. I. 266 (1875), is decisive of the case at bar and we see no reason either on principle or authority to depart from the law as thus established in this State.

In the *Simmons* case one Bosworth made a deposit for his step-daughter in a savings bank, in his own name as trustee, and received from the bank a bank book in which the account was entered as a trust account. At different times additional deposits were made by Bosworth to the trust account and all the dividends were credited to the account as they accrued, except one which was paid to Bosworth. The bank book was shown by Bosworth to his step-daughter but was kept by the wife of Mr. Bosworth in a box where the bank books of all the three members of the family were kept. The book was taken by Bosworth several times to the bank to have the interest entered. For the defendant it was claimed that no effectual trust was created, as Bosworth by keeping

possession of the book always kept and intended to keep control over the deposit for his own use, and did in fact so control it by receiving the dividend which was paid to him. It was held that the trust was completely constituted; that the bank book was given by the bank to him as trustee and as trustee he properly retained possession of it; that although Bosworth might have declared himself more explicitly all was done which the claimant could ask unless she desired to have the money paid or transferred to her, which, as the court said, would not be constituting the trust, but carrying it into effect and discharging it. At p. 268 the court, speaking through Durfee, C. J., said: "A person need use no particular form of words to create a trust, or to make himself a trustee. It is enough if, having the property he conveys it to another in trust, or, the property being personal, if he unequivocally declares, either orally or in writing, that he holds it in praesenti in trust, or as a trustee for another." After citing authorities, the court continues: "And the creation of the trust, if otherwise unequivocal, is not affected by the settlor's retention of the instrument of trust, especially where he is himself the trustee." The trust having been once created, subsequent declarations of the creator of the trust, which, if true, tended to prove that the fund was claimed by Bosworth as his own, could not have any legitimate effect upon the trust and this was true also in regard to the withdrawal of the dividend.

In the case at bar we think the facts in support of the trust are stronger even than in the *Simmons* case. Respondent calls our attention to certain statements of Mr. Davis made after the execution of the deed of trust, to his acts in taking and disposing of some of the stock originally dedicated to the trust and to his conduct in regard to the dividends. Regarded alone and without reference to the admitted facts, a doubt perhaps might be raised in regard to the donor's intentions, but considered as

they properly should be in the light of the entire evidence in the case they fail to change our conclusion.

The amount of the trust was not large from the point of view of the donor. Considering the relations of the parties and the fact that the donor regularly gave to complainant much more than the amount of the dividends, his failure to give complainant each dividend as it was received is of no particular importance. His actions, if the most unfavorable view be taken, appear to be technical breaches of trust rather than an attempted repudiation or denial of the trust. We are satisfied that the donor intended to give complainant a present interest in the subject matter of the trust. The words, "I hereby declare to be held in trust," show an intention to give the beneficial interest in praesenti. We can not believe that the donor, when he told complainant on her wedding day that he had made her a wedding present, meant that he had given her something in his will. He was an experienced lawyer and presumably was familiar with the requirements necessary to make a testamentary disposition of his property. A present beneficial interest having been created, the character of the trust was not changed by the fact that the beneficiary was not entitled to receive possession of the trust property until the death of the donor. In *Atkinson*, Petitioner, 16 R. I. 413 (1889), one William Atkinson made a deposit for his son, Willie, in a savings bank and made the following entry on the signature book of the bank, "Willie J. Atkinson, William Atkinson, trustee." The bank opened an account and issued a pass book in this form to the father. Later the father withdrew the deposit and accumulated interest from the bank and invested the money in his own name. He also made deposits in the bank in the same manner for three other children. He made no withdrawals from those accounts, but retained all of the deposit books until he died. He told each of the four children, that he had made the deposits for them, and that

the money would be theirs at his death. No memorandum of the transactions of any kind was made by the father and the pass books were never delivered to the children. It was held, affirming the decision in *Ray v. Simmons*, that a valid trust was properly created for each of the children; that the son, Willie, was entitled to the money deposited for him with interest from the time of the original deposit; the trustee, having once made a valid trust, had no power to revoke it. At page 415, *Durfee, C. J.*, said: "There are cases which hold otherwise, but it seems to us that the courts which decided them did not sufficiently distinguish between a gift, which requires a delivery of the thing given, actual or symbolical and the creation of a voluntary trust which requires for its conservation, not a delivery of the subject of the trust to the beneficiary, but a retention of it by the trustee for the beneficiary's benefit; and, of course, where the donor makes himself the trustee, a retention of it by the donor as trustee for his benefit."

In *Gobeille v. Allison et al.*, 30 R. I. 525 (1910), this court affirmed the cases of *Ray v. Simmons* and *Petition of Atkinson*. In the *Gobeille* case a mother made a deposit in a bank in her own name as trustee to the credit of her daughter, and a deposit book was given to the mother in the like form. At the time of making the deposit the mother informed the bank that she wished to retain control of these deposits during her life, as she might change her mind and do something else with the deposits. Later the bank book was delivered to the daughter who subsequently returned it to her mother in whose possession it remained until her death. It was held that a trust was not created at the time of the deposit because the mother did not intend to make an absolute and binding trust at that time, but that the subsequent conduct of the mother in delivering the book to the daughter and informing her of the trust, amounted to a declaration on the part of the mother that she held the fund in praesenti in

trust for the daughter and that a valid trust was constituted which was irrevocable. This case does not support respondent's contention and in no way weakens the authority of the Simmons case. The delivery of the bank book was not the essential thing to constitute the trust, but was evidence which, in connection with the information given to the daughter, established the intention to then make a trust. There was no change made in the res which was the right to demand a fixed amount of money from the bank nor was there at the time the trust became effective any deposit made or transfer of legal title. The intention to create a trust is the essential thing; this intention must be expressed and must be clearly established by proof, the nature of which naturally varies in different cases. In the case at bar we find the intention to establish a trust in praesenti, the expression of this intention by the written declaration of trust; the subject matter of the trust was designated and set apart in such a manner that it could be identified, and the beneficiary was informed of the creation of the trust. There was but little if anything more which the donor could have done to make a valid trust. The donor was entitled to retain the stock in his possession, also to retain the deed of trust. It was not necessary to make any delivery to the beneficiary. By the declaration of the trust the beneficiary acquired at once a beneficial interest in the res, and of necessity the donor at the same time parted with such beneficial interest. In a certain sense it may be said that there was then a transfer of the beneficial interest from the donor to the beneficiary but such transfer resulted by operation of the declaration of trust and as a result thereof and required no further or other act.

Our conclusion is that the complainant was entitled to the 422 interests at the death of Mr. Davis and so much of the decree appealed from as established her right thereto is affirmed, and the appeal of the respondent is dismissed.

By the decree of the Superior Court respondent was required to pay to complainant all dividends and all interest therefrom received after the death of Mr. Davis. The dividends were retained by respondent, a banking corporation, and certificates of deposit were issued therefor, upon which four per cent., the highest rate of interest allowed on any such deposit, was credited by the bank. Complainant claims that she is entitled to receive six per cent., the legal rate of interest, whether that amount was actually earned or not, or, at the least, to four per cent. per annum, compounded semi-annually.

The respondent acted in good faith in depositing the funds in the form of certificates of deposit. The propriety of making such a deposit in any other solvent banking corporation is not questioned. In the circumstances there was nothing improper in the action of respondent in keeping the fund in its own bank. If the deposit had been made in another bank, as the interest was received, naturally and properly, it would have been invested, presumably in the same form, by certificates of deposit. Having retained the fund in its own bank, respondent should have invested the interest as it fell due and consequently we find that respondent is chargeable and should pay interest at the rate of four per cent. compounded semi-annually.

Respondent is not entitled to counsel fees to be paid out of the fund. This is not a case of interpleader. On the contrary respondent claims to hold legal title by right in itself and adversely to the complainant, and the latter is not required to pay the counsel fees of her adversary. The cross appeal of the complainant is sustained.

Counsel may present to this court an order and form of decree, for entry in the Superior Court on July 5th next, at 9 o'clock a. m., Standard time.

For Complainant: Edward & Angell, Eugene A. Kingman and John W. Baker

For Respondents: Tillinghast & Collins, William R. Tillinghast and Harold E. Staples.

SUPERIOR COURT

Ethel S. Pepper p. a.)

vs.

William M. Lee,
City Treasurer

Ex. &c. No. 5430

RESCRIPT

June 22, 1921

(Before Judge Blodgett Below)

This is an action brought by Ethel S. Pepper by her next friend, Harry Pepper, against William M. Lee, City Treasurer, of the City of Cranston, to recover damages alleged to have been suffered by her through a defect in the sidewalk at the corner of Cranston street and Depot avenue in said city.

The case was tried before a justice of the Superior Court sitting with a jury and a verdict for \$2500 was rendered for the plaintiff. The defendant filed a motion for a new trial in which it was alleged that the verdict was against the law, the evidence and the weight thereof and was excessive. The trial judge granted a new trial on the question of damages only.

The defendant has now prosecuted his bill of exceptions to this court setting forth (1) that the ruling of the trial justice denying the defendant's motion for a new trial except as to the question of damages was erroneous; (2) that the trial justice erred in permitting the plaintiff to introduce in evidence the notice of the accident given to the defendant; (3) that the trial justice erred in denying the motion of the defendant to direct a verdict, and (4) that the court erred in the portion of its charge relating to internal injuries.

The second exception of the defendant raises a question as to the sufficiency of the notice given to the city in behalf of the plaintiff under the provisions of Chapter 46 of the General Laws 1909. Section 15 of said chapter provides that any person receiving or suffering personal injury by reason of any defect in a public highway may recover damages therefor. By Section 16 it is incumbent upon any person so injured to give to the town or city obliged to keep such

highway in repair notice, within sixty days of the time, place, and cause of such injury, and it is further provided by Section 18 that such notice shall be signed by the person injured or damaged or some one in his behalf.

In the case at bar the notice was signed, "Harry Pepper as next friend of Ethel S. Pepper, By his Attorneys, Sullivan & Sullivan." The defendant claims that this notice fails to meet the requirements of the statute because it is neither signed by the party injured nor by some one in her behalf and therefore should not have been admitted in evidence. The notice for which the statute provides is designed to apprise the municipal authorities as to the locus of the accident and afford them an opportunity to examine the same while the surrounding conditions remain unchanged.

The defendant does not contend that the notice fails to give the information which the statute contemplates, but that the form in which it is signed renders it nugatory. While there may be some technical irregularity in the method in which the notice is subscribed its purport is clear. Considered in its entirety the notice bears unmistakable evidence that it is a proceeding in behalf of Ethel S. Pepper. It begins with the words, "Respectfully represents the undersigned as next friend of Ethel S. Pepper, a minor, three years of age," and concludes, "Wherefore said Harry Pepper as next friend, of said minor, presents this claim for damages by her sustained," etc. We think that the notice must be held to be adequate and that the defendant's second exception must be overruled.

The trial judge, in his rescript upon the defendant's motion for a new trial, expresses himself as shocked at the size of the verdict and also says that he is unable, upon a careful consideration of the testimony, to determine what would be a just award. However difficult it might be for the trial judge to determine the amount which would be fitting compensation for the injuries sustained,

he had the same data as the jury to whom the case had been submitted and we think, as this court has said before, that it was his duty to fix a remittitur. *Marsella v. Simonelli*, 45 R. I. 153.

As there is to be another trial, we think that the whole case should be submitted to another jury. It seems to us that in this particular case the testimony bearing upon damages and liability is interwoven to such an extent that any effort to exclude one part thereof in another trial would be attended with difficulties which might be prejudicial.

The defendant's first exception is sustained, his other exceptions are overruled and the case is remitted to the Superior Court with direction to give the defendant a new trial without restriction.

For Plaintiff: Sullivan & Sullivan and D. E. Colton.

For Defendant: Frank H. Wildes.

SUPREME COURT

George G. Smith vs.	}	Ex. &c. No. 5420
Hyman Koretsky		
James W. Rodman vs.	}	Ex. &c. No. 5421
Hyman Koretsky		
Frederick A. Brown vs.	}	Ex. &c. No. 5422
Hyman Koretsky		
Hyman Koretsky vs.	}	Ex. &c. No. 5419
George G. Smith		

RESCRIPT

(Before Judge Sumner Below)

The four above entitled cases were tried together in the Superior Court. Each is an action in trespass on the case for negligence and involves the consideration of a collision at the corner of Ives and Tockwotten streets, in the city of Providence, between an automobile owned and driven by George G. Smith and an automobile owned and driven by Hyman Koretsky. Smith brought suit to recover for damages caused to his automobile. Plaintiffs Rodman and Brown, who were passengers in Smith's automobile, each brought suit against Koretsky to recover for personal injuries

and loss of wages. Koretsky brought suit against Smith to recover for personal injuries and damage to his automobile. The jury found that the collision was caused by the negligence of Koretsky and returned verdicts as follows: For the defendant, Smith, in the action brought by Koretsky; for Smith in his action against Koretsky, assessing damages at \$122.90; for Rodman at \$150.

In each case Koretsky made a motion for a new trial on the usual grounds. Each motion was denied by the trial court. The several cases are before this court on Koretsky's exceptions, which are as follows: To the ruling of the trial court denying his motion in each case for a new trial; to the admission of certain testimony of George G. Smith; to the refusal of the trial court to direct a verdict for the defendant in the case of Smith v. Koretsky.

The exception to the testimony of George G. Smith has no relevancy except in the case of Smith v. Koretsky. The testimony consisted of a description of the damages to Smith's automobile and testimony and memoranda to the effect that Smith suffered loss to the extent of \$160, by being deprived of the use of his automobile for sixteen days. Koretsky states in his brief that "the statement of the amount lost by the plaintiff (Smith) as well as his written statement to the same effect were apparently disregarded by the jury." If the testimony was disregarded by the jury, and we agree that it was, Koretsky has not been prejudiced by the introduction of said testimony.

The damages which were awarded are not excessive in any one of the cases. Each of the verdicts has been approved by the trial court and there appears to be no reason for disturbing the verdicts of the jury.

In each case all of Koretsky's exceptions are overruled and each case is remitted to the Superior Court with direction to enter judgment upon the verdict.

For Plaintiffs: George W. Bennett.

For Defendant: Leon Semenoff.

SUPREME COURT

Cameron & Ingalls
Engineering Co., Inc. }
vs. } Ex. &c. No. 5471
Providence Body Co. }

OPINION

June 23, 1921

(Before Judge Blodgett Below)

RATHBUN, J. This is an action in assumpsit to recover the contract price of certain labor and materials. The case is before this court on the defendant's exception to the action of the trial court in directing a verdict for the plaintiff for \$3269.64; also on exceptions to certain rulings made during the trial.

The parties entered into a contract whereby the plaintiff agreed to install in accordance with a blue print plan a gravity return steam heating system (excepting boiler and burner), in the defendant's office building and factory for the sum of \$3112.50. The boiler and burner were furnished by the defendant, and installed by another contractor, but by the terms of the contract it was the duty of the plaintiff to connect the main steam supply pipe with the defendant's boiler header. The contract contained a clause as follows: "This system will be sufficient to maintain a temperature of 60° in main building and 70° in the office at zero weather, with five pounds steam pressure in mains." The main building was about eighteen feet distant from the office building in which the boiler was located. It being the defendant's desire that the steam pipes connecting the two buildings should not be exposed to the elements the contract provided that the supply pipe which takes the steam from the boiler should run from the top of the boiler horizontally to a point near the end of the office building and, dropping down, pass through the tunnel to the basement of the main building and rise from the basement to the roof of said building. The contract also provided that the re-

turn pipe should pass through said tunnel to the boiler. The plaintiff had nearly completed its work as specified in the contract, except making connections with the boiler, before the boiler arrived. After the boiler was set and connections were made it was found that the water line was but six inches or less below the main steam pipe which takes the steam from the boiler. The result was that when the water in the boiler was heated sufficiently to produce the necessary steam pressure, water passed from the boiler into the pocket made by running the main steam pipe through the tunnel. The pocket being filled with water it was impossible to force steam into the main building and the steam pressure against the water in the pocket caused hammering.

The plaintiff performed all of its work in accordance with the contract and the defendant's experts admitted that the system would work properly if the boiler was lowered enough to bring the water line the proper distance below the main steam pipe. This the defendant did not do. It remedied the defect by drawing the water from the pocket in the main steam pipe through a small pipe into a tank by the side of the boiler from whence the water was pumped by an electric pump back into the boiler. To install this extra equipment cost the defendant \$1135, which sum it contends should have been deducted from the plaintiff's bill. The system described in the contract was a gravity return system. After the extra equipment was installed the defendant had a different system than the plaintiff had agreed to install. It had a more expensive and probably a better system.

The defendant contends that the plaintiff before the contract was signed orally agreed to determine the depth of the pit. Joseph W. Monahan, treasurer of the defendant company, testified that before the contract was signed, "We informed both of these gentlemen (officers of the plaintiff company), that * * * we wished them * * * to determine the

location and depth of the pit of the boiler which we were to furnish." "They didn't figure on furnishing the boiler, but they did tell us they would determine the location of it." The plaintiff's witnesses denied that the plaintiff either agreed to fix or did fix the depth of the boiler pit.

The contract for setting the boiler was given to another contractor. The plaintiff's only duty in respect to the boiler was to connect it with the rest of the heating system and with the water supply. The written contract between the parties is complete in itself. No explanation is necessary to make clear its terms or provisions. It states definitely what labor and materials the plaintiff was bound to furnish and also the price which the defendant agreed to pay. The parties having reduced to writing the terms of the agreement the law does not permit the defendant to add to the contract a new provision which requires the performance of additional duties. The rule is more than a rule of evidence. It is a rule of substantive law. 4 Wigmore on Ev. Sec. 2425. It would be equally appropriate for one of the parties to ask to be permitted to show that the price to be paid was different than the amount written in the contract as to ask to show that the plaintiff before the signing of the contract orally agreed to furnish other labor than that definitely specified and described in the written contract. The rule is well illustrated by several decisions of this court. *Zanturjian v. Boornazian*, 25 R. I. 151, was a bill in equity to enjoin the respondents from engaging in business within certain specified territory. The complainant purchased from the respondents a coal and wood business and the respondents executed a bill of sale which, after describing the articles sold, contained the clause "together with the good will of said business." Complainant was not permitted to prove that the respondents at the time of the sale agreed not to engage in business within the limits of territory served by the business which they

sold. See also *Gage Mfg. Co. v. Woodward*, 17 R. I. 464; *Myron v. Union R. Co.*, 19 R. I. 125; *Watkins v. Greene*, 22 R. I. 34; *Kenney v. Foster & Bros. Co.*, 25 R. I. 474.

The defendant contends that the trial court should have submitted to the jury the question whether the plaintiff's engineer, Ingalls, determined the depth of the boiler pit. For our consideration the depth of the pit is of no importance except as it determined the height of the boiler's water line in reference to the main steam pipe. Joseph W. Monahan, treasurer of the defendant company, testified as follows: "Q. And did Mr. Ingalls determine for you the depth of the pit in which the boiler was to rest?" "A. He did." * * * "A. I (defendant) telegraphed to the boiler people to give us the water line of the water column, which was 7 feet and 2 inches." "Did Mr. Ingalls tell you where and how deep to locate the boiler?" A. He did. Q. What did he tell you? A. To make it two inches deeper than he originally estimated." Before the boiler arrived the said Monahan learned from the manufacturer the height of the water line from the bottom of the boiler. He knew that the water line of the boiler should be below the main steam pipe. He knew that the only reason for setting the boiler in a pit was to bring the water line of the boiler below the main steam pipe. It was the duty of the defendant and not the plaintiff to arrange the details of the pit and to set the boiler. Defendant assumed the responsibility of installing the boiler. If the defendant's officers and agents did not know how much below the main steam pipe the water line should be they should have informed themselves, but the testimony shows that they did know. Mr. Ingalls of the plaintiff company testified that he asked that the boiler be set so as to give a drop of 18 inches from the main steam pipe to the high water line in the boiler. This testimony was not contradicted. The defendant knew that the boiler should be set so that the high water line in the boiler

would be 18 inches below the main steam pipe and it was the defendant's duty to arrange the details of the pit so that the high water line would be 18 inches below the main steam pipe. Joseph W. Monahan knew where the high water line was located on the boiler and he knew the height of the high water line on the boiler. By adding 18 inches to the latter dimension the distance from the main steam pipe to the bottom of the pit could have been ascertained. Taking the testimony of Joseph W. Monahan as true, Ingalls merely gave gratuitous advice on a subject concerning which said Monahan with little effort could have informed himself and no inference can be drawn that the plaintiff assumed any responsibility concerning the depth of the boiler pit. The trial court did not err in directing a verdict for the plaintiff.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with the direction to enter judgment on the verdict as directed by the court.

For Plaintiff: Frederick W. O'Connell and Swan, Keeney & Smith.

For Defendant: R. G. E. Hicks.

SUPERIOR COURT

Providence Sc.

State	}	Ind. No. 10782
vs.		
James Allocca et al.		

RESCRIPT

HAHN, J. Heard on petition of defendant Allocca (one of four defendants), for a new trial after verdict of guilty of robbery; said petition being based upon the customary grounds, including that of newly discovered evidence.

Previous to the trial, the defendant, Vicci, pleaded nolo; the defendant, Schidone pleaded not guilty, went to trial and afterwards withdrew his plea of not guilty and pleaded nolo contendere; the defendants, Antonini and Allocca, were found guilty.

The State's case against the defend-

ant, Allocca, was based principally upon the testimony of Margaret Vicci, wife of James Vicci, who had pleaded nolo contendere previous to the trial. She testified in effect that her husband and Allocca arranged to rob the participants in a certain game of cards which was thereafter to be held.

Schidone and Antonini, two gunmen, so-called, came on from New York and, during the night of December 29, 1920, the defendant, Allocca, together with others, was playing cards when, in pursuance of the arrangement between Allocca and themselves, the other defendants, Vicci, Schidone and Antonini, appeared in the doorway of the room in which said card game was in progress and with revolvers held up the players and took money and valuables from them. Schidone and Antonini were acquainted with Vicci and undoubtedly came to Providence following correspondence with him. Thereafterwards Margaret Vicci gave the particulars to the police and, on the same night, she claims she was set upon and beaten by Allocca and certain of his relatives. The defendant, Allocca, claimed he had nothing to do with the so-called hold-up further than that he was one of the victims thereof, and offered an alibi as to his whereabouts on the night that he was alleged to have beaten Margaret Vicci, and claimed that he did not beat her or participate with others in the assault upon her.

During the trial the defendant, Schidone, withdrew his plea of not guilty and pleaded nolo, and upon taking the witness stand after the plea of nolo, testified that Allocca had nothing whatever to do with the affair but was one of the victims.

It is also in evidence that Margaret Vicci went to New York, identified and brought about the arrest of Schidone and Antonini, the two gunmen, and it appeared that she was actively assisting the State in prosecuting Allocca, Schidone and Antonini.

The testimony of Margaret Vicci, which, as before stated, was the prin-

cipal part of the State's case, while given by her in a convincing manner, showed hatred and feeling against the defendants. Testimony so given arouses in the mind a suspicion that the desire for revenge may cause a witness to disregard the obligation to testify truthfully, but, notwithstanding the hesitation with which mankind generally accepts testimony so given, it may nevertheless be true, and the jury saw, heard and believed Margaret Vicci.

The jury gave attention to Allocca's alibi setting out his whereabouts on the evening that Mrs. Vicci was alleged to have been beaten, and from all the facts, having found defendant, Allocca, guilty of the offence charged, it can hardly be said that there was not sufficient evidence upon which to base their verdict if they believed the testimony of the witness, Margaret Vicci, as supported by other circumstances. She told her story in a convincing manner, despite the fact that she was ill, and while she drew a picture of events not usual, she showed that she was accurate in her recollection of some of the men implicated by going to New York and identifying and causing the arrest of the two gunmen, one of whom, Schidone, has already confessed his guilt. There hardly seems any motive for perjurying herself to convict Allocca. The motive claimed by Allocca's counsel to have actuated Mrs. Vicci in swearing falsely in order to convict Allocca was presented to the jury ably and eloquently, but was disregarded by them in reaching their verdict.

As to newly discovered evidence, it is not of enough weight or sufficiently contradictory of material testimony of Mrs. Vicci (taken as a whole) to warrant the granting of a new trial on this ground.

Motion for new trial denied.

For the State: A. A. Capotosto.

For Allocca: Anthony A. Pettine.

SUPREME COURT

Roland E. Brown, p. a. }
vs. } Ex. &c. No. 5435
Albert J. Howard, alias }

OPINION

June 23, 1921

(Before Judge Doran Below)

RATHBUN, J. This is an action of trespass on the case for negligence to recover for personal injuries sustained by the plaintiff while riding a bicycle which collided with an automobile operated by the defendant. The trial of the case before a justice of the Superior Court and a jury resulted in a verdict for the plaintiff for five thousand dollars. The justice who presided at the trial denied defendant's motion for a new trial. The case is before this court on defendant's exceptions taken to rulings of said justice during the trial.

The defendant in his brief considered only those exceptions which are numbered from 5 to 19, inclusive. Exceptions 5 to 14 were taken to the ruling of the court permitting plaintiff's counsel to ask the defendant on cross-examination whether on certain dates specified in the questions he had been convicted of violating the statutes regulating the speed of automobiles on the public highways. Certain of these questions the witness answered in the affirmative. He answered some of the remaining questions in the negative and the others by stating that he did not or could not remember.

Section 43 of Chapter 292 (entitled, "Of Views, Witnesses, Depositions and Evidence.") G. L. 1909. provides as follows: "Sec. 43. No person shall be deemed an incompetent witness because of his conviction of any crime, or sentence to imprisonment therefor: but shall be admitted to testify like any other witness, except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility."

The defendant argues that the only legislative intention expressed in said Section 43 is an intention to so modify the common law that a person convicted of or sentenced for an infamous of-

fence may testify as a witness and to provide that when such a person does testify his conviction of or sentence for an infamous crime or misdemeanor can be shown for the purpose of affecting his credibility.

Public Statutes 1882, Chap. 215, Sec. 38, contained the language: "except that such conviction or sentence may be shown to affect his credibility" instead of "except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility." In all other respects the language of said Section 43 and said Section 38 is the same. The defendant's argument could be urged with greater force if the language of Section 38 in the 1882 Revision had been retained, but when the legislature amended the latter part of said section so as to read, "except that conviction or sentence for any crime or misdemeanor may be shown to affect his credibility," we must assume that the legislature meant "any crime or misdemeanor" and not "any infamous crime or misdemeanor." The language of the statute is too clear to permit the construction urged by the defendant. For many years it has been the practice in this State to permit counsel to ask on cross-examination a party to a cause who takes the witness stand, as well as other witnesses, whether or not he has been convicted of or sentenced for the particular crime or misdemeanor specified in the question. See *State v. Vanasse*, 42 R. I. 278; *State v. Babcock*, 25 R. I. 224; *State v. Ellwood*, 17 R. I. 763.

Exceptions 5 to 14, inclusive, are overruled. All of the other exceptions have been considered and found to be without merit.

No exception was taken to the denial of the defendant's motion for a new trial.

All of defendant's exceptions are overruled and the case is remitted to the Su-

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perior Court with direction to enter judgment on the verdict.

For Plaintiff: Max Levy and Waterman and Greenlaw.

For Defendant: Moore & Curry and Sheffield & Harvey.

SUPREME COURT

Providence Sc.

Wenceslao Borda

vs.

Avice Weed Borda

} Div. No. 12011

RESCRIPT

TANNER, P. J. This case is heard upon motion to quash depositions because of the alleged disqualification of the commissioner who took the depositions in New York.

It was perhaps unfortunate that the bill rendered by the commissioner for his services as commissioner included the charges of Mr. Kent for services in procuring the order for the summoning of witnesses and the taking of deposi-

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—may be seen going through their current copy of the Rhode Island Law Record as they enjoy their luncheon here.



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tions in New York. However, after the testimony of Mr. Dorman and Mr. Kent to the effect that Mr. Kent, although employed by the commissioner's firm, had a right to and did act independently as an attorney and did so act in this matter, we are not prepared to say that the commissioner did act as counsel in the case, and was thereby disqualified. The fact that several months after taking the depositions and just before the actual return of the depositions by the commissioner, he became counsel in another case which was collateral to the

present divorce case did not, in our opinion, render the commissioner's actions void.

In any event we do not think that we ought to quash the depositions and allow the petitioner to reserve this point for final determination in the case.

Motion is therefore denied and exception noted.

For Petitioner: Knauer, Hurley & Fowler.

For Respondent: Tillinghast & Collins.

Rhode Island Law Record

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No Issues During Court's Summer Vacation

IMPORTANT!

**Don't Fail to Read the Announcement
on Page 3 of This Issue**

This is the final number of the Rhode Island Law Record for this term and lawyers who are interested in the success of the publication will consider carefully the statement of the publishers on page 3.

R. I. Law Record, Prov., R. I.

July 1st, 1921

Rhode Island Law Record

Vol. I.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 6

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

THE PACE THAT KILLS.

The death in New York this week of John B. Stanchfield, one of the greatest trial lawyers in the country, aroused some speculation among the members of the bar as to whether his end was hastened in any way by reason of his having been reversed in a \$22,000,000 will contest, which he had won about a year ago after a trial lasting a number of weeks.

Mr. Stanchfield appeared as attorney for the contestants in the Enos will fight and succeeded in getting the jury to break the will. The Appellate Court reversed the finding of the jury. Even to a man of Mr. Stanchfield's stature a setback of such a character after all the mental and physical strain of a long and arduous trial must have had its effect.

Regardless of whether Mr. Stanchfield's demise had any relation to any reverses in his professional life, it can scarcely be denied that many lawyers feel keenly the upsetting of a verdict which they have obtained as a result of diligent research in preparation for a trial and the strenuous work of a hard-fought contest before a judge or jury.

Some lawyers, however, are fortunately endowed with a mind that can close the door to worry over any of their cases. On the other hand there are lawyers—and this class takes in some of the ablest members of the bar—who are poor losers. One of the best trial lawyers at the Rhode Island bar only

recently told the writer that when the trial justice directed a verdict against him in a big negligence case it was a severe shock to him, for he felt he had a very strong case, and he thought that everyone in the court room could see the agitated state of his mind. This lawyer took the case up to the Supreme Court and got a new trial, at which the jury awarded his client a verdict of over \$15,000.

Another well-known trial lawyer of this State spent six weeks in the trial of a will case and it did not appear to affect him much to learn that the jury had disagreed. He was asked by the writer if it wasn't a hard blow to him to work so hard and have his efforts go for naught. He replied that it was all in the game and that he never carries a case in his mind after he had finished it. And he never takes his business home with him.

There are lawyers who take their business home with them—that is to say, they cannot drive from their minds the cares of the office when they get home. A lawyer who used to be in the attorney general's department tells a story of how, when he was prosecuting a certain murder case, he would think of something in the middle of the night and get out of bed and make a memorandum of it. He said he got up so frequently that his wife finally got him a pad and pencil and placed them on a table near an electric bulb at his bedside so that he wouldn't have to get out of bed.

Busy lawyers pursue a killing pace and happy are those who can close their minds to their work upon leaving their office. And they live longer, too, we venture to say.

Important Announcement!

This is the final issue of the Rhode Island Law Record for the present court term. Publication of the periodical will be resumed on the last Friday in September and will continue for that court term till all the rescripts and opinions of both the Supreme and Superior Courts are handed down next summer, which will probably be early in July.

The Record publishes the full text of all opinions and rescripts of both courts for the current week and the jury and equity calendars for the ensuing week.

The publishers feel gratified at the results of the experimental period which began April 15 of this year with the type-written duplicating process and shifted to the printed document six weeks ago. Lawyers who subscribed for the trial period—and they embraced the major portion of the bar—have been loud in their praise of the Record. They have been a unit in declaring that the publication has rendered a creditable service. The publishers have endeavored to be prompt and accurate and feel from the many complimentary endorsements received that they have succeeded very well.

Without subscriptions no publication can exist no matter how glowing the tributes to the character of the periodical may be. So if the members of the Rhode Island Bar will register their approval of the R. I. Law Record by signifying their intention to subscribe for the next court year they will get a bigger and better service than ever. The subscription price will be \$15 a year, or, if desired, \$4 a quarter. No remittances are desired at this time. Simply drop a postal card stating that you will be a subscriber for the next court year and in the fall you will receive a subscription blank. Only in this way may the publishers ascertain the probable circulation of the Record and thus be in a position to fix the rates of advertising which is essential to the life of any publication.

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SUPREME COURT

Catherine Turbitt,
et al.
vs.
Paul Carney, et al.

Equity No. 505

OPINION

(Before Tannen, P. J., Below)

June 28, 1921

SWEETLAND, C. J. This is a bill in equity praying for partition of a certain parcel of land and the buildings thereon situated in the city of Providence in which parcel the complainants allege that they are tenants in common with the respondents.

The respondents in their answer set forth their claim that the complainants have no interest in said parcel and that the title to the same is solely in the respondents. The case was heard before a justice of the Superior Court, who

sustained the contention of the respondents and entered a decree dismissing the bill from which decree the complainants have appealed to this court.

The controversy between the parties calls for the construction of certain provisions contained in the will of Ann Byron, late of Providence, deceased, who was the grandmother of each of the parties, complainant and respondent. Ann Byron, then a widow, died testate in 1872, leaving two sons, Theodore and Patrick, both of whom have since deceased, and four daughters, Delia, Rosanna, Mary and Margaret, all of whom are now deceased. The will of Ann Byron was duly probated. By the fourth and fifth clauses of said will the testatrix bequeathed the parcel of real estate now in question to a trustee to hold in trust for the benefit of her four daughters, who were specifically named in said clause. The trustee was directed to permit the daughters to occupy the house upon said parcel, or any part

thereof; he was to pay the net income from the estate to them, "or the survivor or survivors of them share and share alike." Power was given to the trustee to sell and convey said parcel in fee simple upon the joint request of said daughters. In case of such sale the testatrix directed as follows: "The proceeds thereof shall be invested in the name of said trustee in some productive securities and the income arising from such investments shall be paid to my said daughters as aforesaid. At their decease said securities shall become the property of their heirs-at-law." Said parcel has not been sold by the trustee. The testatrix failed to specifically provide for the disposition of said real estate upon the decease of the survivor of said daughters if the same had not been sold and the proceeds invested during their life time in accordance with the terms of the will. The parties all agree that it was the intention of the testatrix, fairly to be gathered from the provisions of the will, that if said real estate should not be sold during the life time of the daughters or their survivors or survivor the same should then pass free from the trust in the same manner as was provided with reference to said securities if the real estate should be sold; and that on the death of survivor the real estate became the property of the heirs-at-law of said daughters. Under the terms of the will this appears to us to be a proper conclusion as to the intention of the testatrix in that regard.

The real point in issue is as to who are the heirs-at-law of said daughters. Said daughters died in the following order: Delia in 1883, Rosanna in 1896, Mary in 1907 and Margaret in 1919. Delia, Mary and Margaret were never married. Rosanna married, whether before or after the death of her mother, the testatrix, does not appear and on her death left children, who are the respondents in this case. The complainants consist of two groups, one group including all the children of said Theodore Byron, deceased, and the other in-

cluding all the children of Patrick Byron, deceased.

Said justice of the Superior Court entered the decree dismissing said bill on the ground that upon the death of Margaret, the survivor of said daughters of the testatrix, the respondents, the children of the daughter, Rosanna, alone answer the description of the "heirs-at-law" of said four daughters. He bases this upon his determination that the devise for the benefit of the four daughters was to them as a class. There appears to us to be no connection between the question at issue and the conclusion that the daughters of the testatrix received a beneficial interest in said real estate as a class. As the daughters were all alive at the death of the testatrix and capable of receiving the equitable interest when it took effect the question of whether they were the objects of the testatrix's bounty individually or as a class does not arise. The clearly expressed words of survivorship contained in the devise created an equitable joint life estate in the four daughters which terminated upon the death of the survivor, Margaret. The property then passed in fee simple to those who came within the designation of "their heirs-at-law." Said justice of the Superior Court construed those words to mean "their children." Such construction of the words, "heirs" or "heirs-at-law," is never permissible unless that clearly appears to have been the intention of the testator. Nothing in the context nor in any provision of the will of Ann Byron indicates such intention. The words, "heirs-at-law," should be given their ordinary meaning as designating those persons who would be entitled to inherit from said daughters respectively in case of their intestacy.

The devisees after the equitable life estate took as purchasers under the will and not through their daughters. Nevertheless, in using the phrase, "heirs-at-law," of said daughters, the testatrix must be presumed to have intended that these devisees should not take said property per capita, but per stirpes in the

same manner that heirs-at-law would inherit real estate from said daughters, respectively. *Branch vs. De Wolf*, 38 R. I. 395. The heirs of each daughter would take one-fourth of said estate. The heirs-at-law of each of the unmarried daughters, Delia, Mary and Margaret, consisted of three groups; the children of their brother, Theodore, of their brother, Patrick, and of their sister, Rosanna, each group collectively taking one-third of one-quarter of the whole estate as heirs-at-law of each of said unmarried daughters. The heirs-at-law of the married daughter, Rosanna, are her children, these respondents, who as heirs-at-law of their mother would collectively take one-fourth of said estate in addition to the interests which came to them as heirs-at-law of their unmarried aunts.

The appeal of the complainants is sustained. The decree of the Superior Court appealed from is reversed. The cause is remanded to the Superior Court for further proceedings.

For Complainants: Quinn & Kernan.

For Respondents: McGovern & Slatery, E. T. Voight and Walter W. Osterman

SUPREME COURT

Pugh Brothers Co.	} Ex. &c. No. 5462
vs.	
Paul Marano	

OPINION

June 29, 1921

(Before Judge Doran Below)

SWEETLAND, C. J. This is an action of trover brought by John E. Pugh, doing business as Pugh Brothers Company, to recover the value of an automobile alleged to have been converted by the defendant.

The case was tried before a justice of the Superior Court sitting with a jury. At the conclusion of the evidence, on motion of the plaintiff, said justice directed a verdict for the plaintiff for \$145.55. The case is before us upon the defendant's exception to the action of

said justice in directing a verdict for the plaintiff and also upon his exception to the refusal of said justice to direct a verdict for the defendant.

It appears that the plaintiff is a dealer in automobiles; that the automobile for the alleged conversion of which this action is brought was a second-hand machine on July 11, 1919, when it was delivered, by the plaintiff, to the defendant subject to the terms of a written contract for its conditional sale to the defendant; that in accordance with the terms of said written contract the defendant delivered to the plaintiff a series of promissory notes in payment for said automobile and in said contract it was agreed that "title to the car shall remain in Pugh Brothers Company until fully paid for, including payment of any and all notes given on account thereof;" that when said promissory notes became due they were not paid by the defendant and the defendant then gave to the plaintiff, and the plaintiff accepted, a second series of notes in substitution for the series first given; that when the notes of the second series became due they were not paid and the plaintiff then took from the defendant a third series of notes in substitution for the second series; that the notes in the third series were not paid when due and the defendant then admitted to the attorney of the plaintiff that he had sold the automobile. This act on the defendant's part was contrary to the terms of the written agreement and constituted a conversion of the automobile. At the trial the plaintiff offered evidence of the conversion, and for proof of his damages the plaintiff relied solely upon evidence showing the amount of the defendant's unpaid notes. The defendant offered no evidence and on motion the justice directed a verdict for the plaintiff for the amount due upon said notes.

The defendant's motion for direction of a verdict was properly overruled. In support of the motion, and of the exception before us, the defendant urged that as the plaintiff had produced no evidence

as to the value of the automobile at the time of the conversion the defendant should have a verdict in his favor. The defendant did not attempt to contradict the evidence that he had sold the automobile in violation of the terms of the contract and was guilty of conversion. In trover, upon proof of conversion of a chattel, if no evidence is presented as to its value at the time of the conversion, the plaintiff is entitled to a verdict for nominal damages. The defendant further contended that the verdict should have been directed in his favor because the taking by the plaintiff of the second series of notes in law amounted to a payment of the first series and worked a conveyance of the title to the automobile from the plaintiff to him. This contention is not sound. The second series was clearly taken in renewal of the first and not as payment. It was not the intention of the parties that by this transaction the conditional sale should be converted into an absolute one, transferring the title from the seller to the purchaser, and it did not have that effect in law.

We are of the opinion that the defendant's exception to the ruling of the justice directing a verdict for the plaintiff should be sustained. In *Woods vs. Nichols*, 21 R. I. 537, and in the same case, 22 R. I. 225, the court stated the proper measure of damages in a case of this kind, adopting the generally recognized rule. If the purchaser in a conditional sale converts the chattel sold, the seller may recover in trover damages equal to the unpaid balance of the purchase price if the value of the chattel at the time of the conversion equals or exceeds such balance. If at the time of conversion the value of the chattel is less than such balance the measure of damage is the value of the chattel. In *Woods vs. Nichols*, 22 R. I. 225, the court explicitly stated that it "did not hold that the contract price was the value of the property but only that the plaintiff's interest in it could not exceed that amount." It is equally the law that, without further proof, the unpaid

balance of the contract price cannot be taken as the value of the plaintiff's interest in the chattel. It follows that in this class of cases it is necessary for the plaintiff to show not only the balance due upon the contract, but also the value of the chattel at the time of conversion in order that the jury may have sufficient data for the assessment of damages in the case, in accordance with the rule which this court has laid down regarding their proper measure. It was error for the Superior Court, in the absence of all evidence tending to show the value of the automobile at the time of the conversion, to direct the jury to find for the plaintiff for the amount due on notes. *Hall vs. Nix*, 156 Ala. 423; *Moultrie vs. Hill*, 120 Ga. 730, at 733.

The defendant's exception to the ruling of the Superior Court, directing a verdict for the plaintiff is sustained. His other exception is overruled. The case is remitted to the Supreme Court for a new trial.

For Plaintiff: John H. McGough and Cooney & Cooney

For Defendant: Pettine & DePasquale.

SUPERIOR COURT

Providence Sc.

Henry W. Mason

vs.
John E. Nichols

} Law No. 49122

RESCRIPT

June 27, 1921

BARROWS, J. Heard on plaintiff's demurrer to defendant's second plea.

The action is assumpsit substantially on the common counts, to recover \$32,711.

Plea: 1. General issue: 2. That in a former suit in this court of the now defendant, Nichols, against the now plaintiff, Mason, for \$11,677, the value of 28 bales of cotton, Mason's defence, under the general issue, was evidence (in recoupment) that Nichols owed Mason \$34,331; that the latter question

was submitted by the court to a jury for decision; that the jury did not sustain Mason's contention and returned a verdict for the full amount claimed by Nichols; that the present suit by Mason is between the same parties and for the same causes as were passed upon by the jury adversely to Mason on his recoupment claim in said former suit, all of which more fully appears in the records of said case.

The plaintiff demurs to the second plea on the ground (a) that it is not a defence; and

(b) that said plea does not aver that any judgment has been entered in said former case.

The records in the former case, to which the plea refers, show that a verdict was rendered in favor of Nichols by the jury for \$12,005; that the verdict was set aside by Judge Doran, who heard the case, and a new trial was ordered; that exceptions thereto are awaiting completion of the transcript before transmission to the Supreme Court. In view of this state of the record, it seems to us unimportant that the jury found against Mason in the former case on the very issues sought to be now raised. Such verdict is not res adjudicata. It can not be res adjudicata until the entry of judgment.

Dougherty vs. Lehigh Co., 200 Pa. St. 635.

P'per vs. Boston & Maine R. R. 75 Atl. 1041 and 1048.

Hawkes vs. Truesdale, 99 Mass 557.

Smith vs. McColl, 16 Wallace 560.

Schurmeiser vs. Johnson, 10 Minn, 319.

The pendency of an earlier action involving the same facts may be ground for abatement if properly pleaded.

1 Ency. Pl and Pr. 750.

Bullock vs. Bowles, 9 R. I. 501.

Polsey vs. White Rose Mfg. Co., 19 R. I. 492.

It is not properly pleaded if it follows a general issue. A plea of general issue

without reservation operates as a waiver of whatever ground defendant may have had in abatement.

Gardner vs. James, 5 R. I. 235.

Potter vs. James, 7 R. I. 312.

Granite Bldg. Corp. vs. Green, 25 R. I. 586.

In answer to this defendant asks that his plea of the general issue be stricken out. In view, however, of the conflict and sharp differences between counsel at the present hearing as to what had taken place in the litigation between these parties in Rhode Island and elsewhere, it seems to us imprudent to grant defendant's request to withdraw his plea of the general issue in order to clear the way for a consideration of his plea in abatement.

Apart, however, from the objection that there has been a waiver of the right to plead in abatement, we are unable to find in the present plea good ground for abatement. We are unwilling to say that Mason has chosen to recoup and must stand by his choice. The plea avers that Mason put in issue the facts upon which his present case rests. It is evident that they were not involved of necessity. If they had been necessarily involved, the case would be like Banigan vs. Woonsocket Rubber Co., 21 R. I. 146, where the pendency of another action undetermined was enough to prevent a second use of the same facts by way of a plea in set-off. From that case we deduce that if Mason had pleaded set-off in the first suit, even though no judgment had been rendered, Nichols could now plead successfully a pending action to prevent double vexation for the same cause. On the facts before us, however, with the general issue pleaded by Mason in the first case, and with the verdict in that case set aside by Justice Doran, who granted a motion for a new trial, we fail to see how that case can be said with certainty to affect the present one. There is no assurance that the verdict will stand, and if we accept the situation as it exists today, with the verdict set aside, there is no

certainly that defendant would again attempt the defence of recoupment or that Mason's claims in this suit would go before the jury on another trial of the first case.

Piper vs. Boston & Maine R. R. supra at 1043.

We concede that use of these facts should only be made in one case. We appreciate Nichols's desire to escape covering the field again, but we cannot see our way clear to sustain his plea as good either in bar or in abatement. If subsequent proceedings in the Supreme Court should turn the verdict into a judgment by reversing Judge Doran, defendant may then file a plea *pour-darrein*.

Paine vs. Schenectady Ins. Co., 11 R. I. 411.

If not, he certainly is entitled to no advantage from the verdict of the jury which Judge Doran held unwarranted.

Demurrer sustained.

For Plaintiff: Waterman & Greenlaw

For Defendant: John P. Beagan

SUPERIOR COURT

Frank A. Williams

vs.

Howard A. Allen,

Town Treasurer

Ex. &c. No. 5392

OPINION

June 28, 1921

(Before Judge Sweeney Below)

STEARNS, J. This is an action on the case for negligence, brought against the town of Warwick to recover damages for personal injuries suffered by plaintiff which were caused by a defect in a highway in said town. The highway, now known as Church avenue and formerly as Meeting House lane, is a dirt road about a mile and a half in length, the traveled part of which is from six to eight or ten feet in width; it runs east and west between Warwick avenue and West Shore road, two main line

highways, which run north and south.

On the afternoon of July 23, 1917, plaintiff, a grocer, was driving his horse and delivery wagon on Church avenue. As he approached the junction of Warwick avenue an automobile truck turned into Church avenue from Warwick avenue. As the traveled and worn part of the way was not sufficiently wide for the vehicles to pass thereon, plaintiff turned partially out of the traveled way to his right onto the grass at the side of the dirt road. The driver of the truck also turned partially out of the traveled part of the way to his right and onto the grass on his side of the road, each driver giving to the other a fair part of the traveled way. Both vehicles were proceeding at a proper rate of speed. After the vehicles had passed each other, as the plaintiff started to return to the middle of the dirt road, the front right-hand wheel of his wagon struck a large stump or log which was lying loose on the ground, and as a consequence, plaintiff was thrown to the ground and was seriously injured. The stump was three or four feet in length, twelve to fourteen inches thick on one end, tapering to five or six inches at the smaller end which was the end near the road. It was lying at right angles with the dirt road, about eighteen inches from the edge of the dirt road, and was covered with grass and bull briars. It appears that one Smith, the owner of the land adjacent to this part of the way, in the spring of the year preceding the accident, had been blasting stumps on his land and that a number of stumps and logs at that time had been blown into the highway. Some of the stumps were removed, but it was claimed that this particular stump had not been removed but had been left at the side of the road.

The case was tried by a jury, who found a verdict for the plaintiff. The defendant's petition for a new trial was denied by the trial justice. The case is now in this court on defendant's bill of exceptions.

At the trial defendant presented to

the trial justice, twenty-five requests for instructions to the jury, many of which the trial justice refused to give to the jury. Defendant took some seventy exceptions, a few only of which were waived in this court. Many of the exceptions are of no importance; others were taken to the refusal of the court to charge in the precise form requested by defendant, although the court had correctly instructed the jury on the questions of law in issue.

The multiplication, without necessity, of request to the court to give instructions to the jury is a hindrance to the orderly procedure of a trial by jury and tends to create confusion and to obscure the real issues in a case. In *Faccenda vs. R. I. Co.*, 43 R. I. 199, this court expressed its disapproval of such procedure and called attention to some of the evils thereof. In the circumstances there is no occasion to examine each exception in detail.

The defendant in its brief has summarized its objections and we will consider the general questions as thus presented. Defendant claims that the finding of the jury that Church avenue was a public highway, which the town was obliged to keep in repair, was against the law and the evidence. We find no merit in this objection. It was claimed that this was a public highway established under the common law. To establish a right to recovery, plaintiff was required to prove: (a) the right of the public to use the highway, established by immemorial or long continued public use; (b) the liability of the town to repair the highway, which is created only by some act of acquiescence or adoption by the town, as for example the assumption by the town of the duty to repair the way and the actual repairing of the same from time immemorial. *State vs. Town of Cumberland*, 6 R. I. 96; *Hampson vs. Taylor*, 15 R. I. 83; *Stone vs. Langworthy*, 20 R. I. 602; *Eddy vs. Clarke*, 38 R. I. 371. The evidence of public user was strong and convincing. The evidence of public maintenance was convincing, although not so

strong as the evidence of public user. Church avenue is a small country highway. The significance of such repairs as were made very properly should be judged with reference to the nature and extent of repairs customarily made by the town on other similar highways at different times. Of necessity in many cases adequate proof of immemorial repair can only be made by proof of a number of different and separate acts by the town. The town for years had opened up this avenue for travel after heavy snowstorms. This action alone is not sufficient to establish the assumption by the town of the duty to repair, but considered in connection with the evidence of repairs actually made or authorized by the town, with evidence tending to show that the town for years had included Church avenue in one of its highways districts and evidence tending to show that an abutting owner had been assessed for a road tax for repairs on this way, such combined evidence was sufficient proof of the assumption by the town of the duty to repair.

Defendant also contends that the jury was misled by one part of the charge of the court in which the court charged that the jury might consider whether or not the town had recognized the way as a public highway. From the context, as well as from other parts of the charge, we think it is clear that the jury was not misled. The court charged to hold the town liable, plaintiff was required to prove that immaterial repairs had been made by the town. There was no error in this respect.

Defendant claims that the evidence is not sufficient to prove constructive notice. The town is held liable if it had "reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part." (Chap. 46, Sec. 15, Gen. Laws). Defendant argues that the obstruction was latent and that to hold it to be the duty of the town to find all such obstructions by either mowing or cutting the vegetation at the side of

the road would impose an unfair burden upon the town. Although the obstruction in the summer may have been latent, in the sense that it was hidden from view at that season, it was not hidden in the winter months. There is evidence that this stump had been lying on the ground in the same place near the traveled part of the way for more than a year prior to the accident and had been seen by at least one witness many times; that during the fall, winter and early spring the stump was plainly visible; in the summer it was almost entirely covered by grass and bramble. Opposed to this is the testimony of a number of witnesses, who passed through this way at different times, that they had never noticed the log. This issue was one of fact for the jury, and the evidence is sufficient to prove constructive notice.

Another general objection is that the jury was improperly instructed in regard to the duty of the town in the maintenance of traveled ways. The trial justice in substance charged the jury that the town was not required to work a road to its full width, but was only required to work the road and to keep it safe and convenient for travelers for a suitable width; that, having taken a view of the way, it was for the jury to decide whether in the particular case the way had been properly maintained for a sufficient width. The question was one of fact for the jury and the instruction to the jury was correct. *Foley vs. Ray*, 27, R. I. 127; *Taylor vs. Winsor*, 30 R. I. 44.

Defendant excepts to the refusal of the trial justice to submit two special findings to the jury.

1. Was the stump or log of wood left within the limits of Church avenue by Patrick J. Smith or anyone employed by him?

2. If the preceding question is answered in the affirmative, did said stump or log of wood remain within the limits of Church avenue up to the time of the accident to the plaintiff?

Prior to the trial defendant notified

Smith to appear and defend the suit and stated to him it was informed that the stump had been left by said Smith in the highway. Smith's counsel was present throughout the trial, but took no part therein. Defendant's contention is that if it is forced to pay it is entitled to reimbursement, and in support of its position cites *Bennett vs. Field*, 13 R. I. 139; *Hill vs. Bain*, 15 R. I. 75; *City of Pawtucket vs. Bray*, 20 R. I. 17. In none of these cases was the question of the existence of the public highway in issue. But in the case at bar that was one of the fundamental issues and, as stated in *Pawtucket vs. Bray*, the only ground upon which the alleged wrongdoer (in this case Smith) could assume the defence of the suit against the town, is the right of reimbursement. The defendant's position is inconsistent. It opposes plaintiff's claim on the ground that the way is not a public highway. At the same time and at the same trial it seeks to compel Smith to defend the case and to hold him liable in case of a recovery by plaintiff, on the ground that the way is a public highway. So far the plaintiff's right to recover is concerned it was not necessary to prove that the log was left in the highway by Smith. If the log had been there for such a length of time in such condition as to charge the town with constructive notice, that was sufficient for plaintiff's case. By Chapter 291, Sec. 6, Gen. Laws, it is provided that the court may, and upon request of either party shall, direct the jury to return a special verdict upon any issue submitted to the jury. Such issues shall be settled by the trial justice and either party may except to his rulings thereon. In each case, in addition to the special findings, the jury shall find a general verdict. One purpose of this provision is to direct the attention of the jury specifically to the decision of an issue which has a direct relation to the general verdict and which is of such importance that the correctness of the general verdict may properly be tested by the propriety of

the special finding. But it is not the right of a party to have a special finding on every issue in a case. In the case at bar the decision of neither of the proposed issues would be decisive of plaintiff's right; nor would such decision necessarily affect the general verdict. In *Reid vs. R. I. Co.*, 28 R. I. 321, which was an action for negligence, the trial court at the request of counsel submitted three special findings to the jury in addition to the main issue in the case. The jury found a general verdict in favor of the plaintiff and in addition therein stated that they were unable to answer the special finding. It was held that although the court erred in not insisting upon a special finding on the issues submitted to the jury, yet as the special issues although relevant were not material to or decisive of the main issue, such error was not reversible error. The exceptions to this action of the trial court are overruled.

All of the other exceptions are overruled and the case is remitted to the Superior Court for judgment on the verdict.

For Petitioner: Washington R. Prescott and Frank Steere.

For Defendant: Harold R. Curtis.

For Smith: Fitzgerald & Higgins.

SUPREME COURT

Beatrice B. Bevan
vs.
Ernest E. Bevan } Ex. &c. No. 5476

OPINION

June 29, 1921

(Before Judge Blodgett Below)

STEARNS, J. This is a petition for divorce brought by the petitioner against the respondent, her husband, which was heard by a justice of the Superior Court and decision was given therein for an absolute divorce in favor of the petitioner on the ground that the respondent had been guilty of continued drunkenness.

The cause is now in this court on the respondent's bill of exceptions by

which exception is taken to the decision of the Superior Court.

From the transcript it appears that, at the conclusion of the hearing, the trial justice stated that he did not think there was any rule that could be laid down in a divorce case as to what was continued drunkenness; that it was a question whether a man was fulfilling the responsibilities that he took on himself when he married, and that was the only test there was, and if his habits so interfered with his marriage responsibilities and the devotion he ought to give to his family that was "continued drunkenness" within the meaning of the statute. The trial justice held the case and within a few days rendered a decision granting a divorce to the petitioner on the ground of continued drunkenness. No rescript was filed in the case. The trial justice was in error in his statement of the law applicable to the case.

In *Gourlay vs. Gourlay*, 16 R. I. 705 (1890), this court, in speaking of the meaning of the phrase, "continued drunkenness," as used in the statute "Of Divorce" (now Chapter 247, Gen. Law), said: "To sustain this charge, when it is alleged as one of the grounds upon which a divorce is claimed, the proof should be sufficiently clear to convince the court that the respondent's habits of drunkenness were confirmed and continued; in other words, that he had become a drunkard, an habitual drunkard, the terms meaning the same thing."

* * *. The words 'continued drunkenness' are used in their ordinary sense in our statutes, and signify gross and confirmed habits of intoxication." The construction of the statute was thus established in this State and we think the case has been quite generally followed in other jurisdictions, where continued drunkenness is a ground for divorce. In the case at bar it appears that the respondent was accustomed to use alcohol regularly and that on some occasions he was under the influence of liquor to a greater or lesser degree. The respondent held a responsible position with a

well-known business firm and attended to his duties regularly and in a manner satisfactory to his employers. The evidence as to his occasional abuse of liquor falls far short of the degree of proof required to establish the fact of continued drunkenness and it is evident that the trial court in weighing the testimony applied an incorrect rule of law in regard to the same. The exception of the respondent to the decision of the trial justice is sustained.

Opportunity will be given the petitioner to appear on Tuesday, July 5, 1921, at 9 o'clock a. m., Standard time, and show cause why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition.

For Petitioner: Joseph C. Cawley

For Respondent: McGovern & Slatery and E. T. Voight.

SUPREME COURT

Florence R. Rubin	} Ex. &c. No. 5467
vs.	
Oscar Klemmer	

OPINION

June 29, 1921

(Before Judge Doran Below)

RATHBUN, J. This is an action of assumpsit for breach of promise of marriage. The trial in the Superior Court resulted in a verdict for the plaintiff for \$5560. The defendant made a motion for a new trial on the usual grounds and the trial court refused to disturb the findings of the jury that the defendant was liable, but held that the amount of damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit all damages in excess of three thousand dollars. The plaintiff did not file a remittitur, but excepted to the decision of said justice. The case is before this court on the plaintiff's exception to the decision granting a new trial and on defendant's exception to the refusal of said justice to grant a new trial with-

out condition; also on certain exceptions of the defendant taken to the rulings of the court during the trial.

The defendant was introduced to the plaintiff some time in December, 1919, and the parties became engaged on January 8, 1920; on February 14, 1920, the defendant gave the plaintiff a diamond engagement ring of the value of five hundred dollars, and June 24, 1920, this action was commenced.

The respondent, who was a widower, was the father of a female child, six years of age. He testified that although he had affection for the plaintiff his main purpose in contemplating matrimony was to obtain a wife who would care for his child and that when he promised to marry the plaintiff it was understood and agreed as a part of the contract of marriage that the plaintiff after the marriage would assume the care of his child. He further testified that a few days after May 25, 1920, the plaintiff told him that she did not intend to take the responsibility of caring for his child and that after the marriage it would be necessary for him to place the child in a home and he replied: "If you don't want my child, then you don't want me;" that after this conversation his attentions to the plaintiff ceased. Plaintiff denied telling the defendant that she would not care for the child and that it would be necessary to place the child in a home. Whether the plaintiff told the defendant that she did not propose to keep that part of her agreement, which relates to the care of the child, was clearly a question of fact for the jury and the finding of the jury on this issue has the approval of the trial court.

The trial justice in passing upon defendant's motion for a new trial filed the following decision: "It seems highly probable, if not reasonably certain, that the jury rated defendant's possessions higher than warranted by the weight of the evidence. New trial granted unless plaintiff within fifteen days of notice of this decision remits all damages in excess of \$3000."

The plaintiff now argues that it is immaterial whether the defendant has much or little property and that the only question is how much damage has the plaintiff suffered. On this phase of the case the main question, of course, is how much damage has the plaintiff suffered by reason of defendant's breach of the contract to marry. But the amount of the plaintiff's damage is dependent to some extent upon the amount of property which the defendant had. If the defendant was possessed of great wealth it is reasonable to assume that the plaintiff, had she married the defendant, would have enjoyed more of the comforts of like and a higher social position than she would have enjoyed if he had been a man of moderate means. 9 Cyc. 372. At the trial the plaintiff contended that defendant by refusing to keep the contract to marry had prevented her from enjoying the benefits which his property would have given her and to show the amount of her damage in this particular she introduced testimony relative to the amount of property owned by the defendant.

Plaintiff testified that she, relying upon defendant's promise to marry her, resigned her position as a saleslady, with the result that she was out of employment for a period of seven months and lost wages to the amount of \$420; that in preparing for a wedding she expended the sum of \$825 in the purchase of certain articles which she would not have purchased had she not expected to marry the defendant. She admits, however, that some of this expenditure was not a total loss.

In addition to the loss of benefits which she would have enjoyed as wife of the defendant she is entitled to recover her financial loss and for any humiliation and any impairment of health due to the defendant's refusal to keep his promise to marry her. 9 Cyc. 372.

The engagement was not of long duration. Within about five months after the defendant was introduced to the plaintiff the engagement was broken and within one month thereafter this ac-

tion was commenced. During the trial no reflection was cast upon plaintiff's character. Although some insinuations were made during the trial that the defendant was a man of wealth, no evidence was introduced to warrant a finding that he had any considerable amount of property. The defendant was a widower and had a small child. The plaintiff had agreed to assume the care of this child. She has been relieved of this responsibility. The trial court evidently considered that the damages awarded were grossly excessive.

We have examined all the evidence and are of the opinion that the sum of three thousand dollars, arrived at by said justice, is liberal compensation for all damage which the evidence fairly shows that the plaintiff suffered by reason of defendant's refusal to marry her.

The exceptions of both the plaintiff and the defendant are overruled. The case is remitted to the Superior Court for a new trial unless the plaintiff within fifteen days after the filing of this opinion shall in writing file with the clerk of the Superior Court her remittitur of all of said verdict in excess of three thousand dollars. If on or before said date the plaintiff files such remittitur the Superior Court is directed to enter judgment for the plaintiff for three thousand dollars.

For Plaintiff: Cushing, Carroll & McCartin.

For Defendant: McGovern & Slatery.

SUPREME COURT

Star Braiding Co.

vs.

Stienen Dyeing Co.,
Inc.

Ex. &c. No. 5473

OPINION

June 29, 1921

(Before Judge Doran Below)

SWEETLAND, C. J. This is an action of the case in assumpsit. The declaration alleges an indebtedness on book

account and contains other common counts.

The case was tried before a justice of the Superior Court sitting with a jury. At the conclusion of the evidence said justice directed a verdict for the plaintiff in the sum of \$647.56, the same being the full amount of its claim. The cause is before us upon the defendant's exception to this action of said justice and upon its exceptions to certain rulings of said justice made in the course of the trial.

The defendant presented to said justice a certified copy of the records of the United States District Court for the Southern District of New York from which it appeared that on November 24, 1920, a petition in bankruptcy was filed against the defendant in said District Court; that a temporary receiver of the defendant's assets was appointed and that the bond required of such receiver had been approved and filed in said court. The defendant then moved in writing that said justice stay this action in the Superior Court under and by virtue of Section 11 of the United States Bankruptcy Law. Section 11 of the National Bankruptcy Act of 1888 is as follows: "A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined." Said justice denied the motion for a stay and proceeded to try the case. To this ruling of the justice the defendant excepted and is insisting upon said exception before us. The plaintiff seeks to support the action of said justice upon the authority of statements contained in the text of Collier on Bankruptcy, 12th ed. Vol. 1, p. 291, and in certain Federal cases cited by the au-

thor in his foot notes to the effect that the power of the court to stay a suit against a bankrupt is discretionary. The stay to which the author and the cases cited by him have reference is not the stay sought by this defendant on its motion, but a stay after an adjudication of bankruptcy or one, in the nature of an injunction, issued by a Federal court to restrain an action against a bankrupt in a State court, or a stay in an action begun against a bankrupt after the filing of a petition in bankruptcy against him. The power to grant such stays is discretionary, but none of them is within the provisions contained in the first part of Section 11. Until after an adjudication or dismissal of the petition against an alleged bankrupt a suit which is founded upon a claim for which a discharge would be a release and which is pending against the alleged bankrupt at the time of filing such petition must be stayed. Of such nature is the plaintiff's claim and such was the condition of his suit at the time of defendant's motion for a stay. The language of the bankruptcy act is peremptory. The action should have been stayed. In Collier on Bankruptcy, 12th ed. Vol. 1, p. 287, the author says: "Stays of suits under the present law are, strictly speaking, confined to actions pending at the time of the bankruptcy. They are mandatory if before the adjudication and discretionary after it. * * * The stay of suits against the bankrupt pending the bankruptcy proceeding is absolutely necessary to give effect to the present bankruptcy act." In re Geister, 97 Fed. 322, the court said: "The bankrupt who is the defendant in the State court should file in that court a proper pleading setting forth the pendency of the proceedings in bankruptcy, and, based thereon, should ask a stay as provided for in Section 11; and, upon being thus informed of the pendency of the proceedings in bankruptcy, it will become the duty of the State court to grant the stay prayed for." *Rosenthal vs. Nova*, 175 Mass. 559.

The claim of the plaintiff that the Superior Court was not properly informed of the pendency of the bankruptcy proceedings appears to us to be without weight. The allegations of the defendant's motion supported by the certified copy of the records of the bankruptcy court required the Superior Court to refrain from proceeding with the trial of the cause.

Nor does the fact, upon which the plaintiff lays stress, that it had obtained a lien by attachment upon the defendant's personal property made more than four months prior to the filing of bankruptcy proceedings, which lien is not discharged by the bankruptcy, relieve the Superior Court from complying with the mandatory provisions of the bankruptcy act. The plaintiff's lien would not have been lost by the stay. If a stay had been granted, after the adjudication or the dismissal of the bankruptcy petition the Superior Court might remove the stay and permit the suit to proceed. As was held in *Butterick vs. Bowen*, 33 R. I. 40, although the defendant receives a discharge in bankruptcy, which he sets up in a plea *puis darrien continuance*, the suit may still proceed to a qualified or special judgment against the defendant for the purpose of permitting the plaintiff to enforce his lien or for the purpose of enabling the plaintiff to bring suit against sureties on a bond given to release such attachment. Said justice of the Superior Court was in error in denying the motion for a stay.

Prior to the time of trial the plaintiff on the order of the Superior Court had filed a bill of particulars of its claims. The items of this bill appear to be charges for goods sold by the plaintiff to the defendant. At the trial the plaintiff was permitted to introduce evidence of work performed by it upon said goods for the defendant at the defendant's request. To this ruling of the justice the defendant excepted. The plaintiff should have been restricted in its proof to the claims set out in its bill.

The action of said justice in directing a verdict for the plaintiff was unwarranted.

All of the defendant's exceptions are sustained. The case is remitted to the Superior Court for such further proceedings, in accordance with this opinion, as are in conformity with the bankruptcy act in the present condition of the bankruptcy proceedings against this defendant.

For Plaintiff: Wilson, Churchill & Curtis.

For Defendant: Ernest P. B. Atwood.

SUPREME COURT

Edith G. Powell, p. a.

vs.

Jeremiah F. Gallivan,
et al.

Ex. &c. No. 5454

RESCRIPT

June 28, 1921

(Before Judge Hahn Below)

This case comes before us upon the petition of the defendant to establish the truth of his exceptions.

The defendant having filed his bill of exceptions in the Superior Court and the plaintiff having objected to the allowance thereof, claiming that the same should not be allowed except with certain eliminations, amendments and restrictions, hearings were had before the justice who heard the case resulting in an order in which certain exceptions were allowed and others disallowed or modified. The defendant contends that his bill of exceptions, as originally filed by him should have been allowed by the trial justice and that the order in the form as entered is prejudicial and abridges his rights.

We have examined the objections of the defendant in connection with the transcript of the evidence and we find no merit therein.

The petition of the defendant is dismissed and the case will stand for hearing upon the exceptions as allowed by the Superior Court.

For Plaintiff: John L. Curran

For Defendant: William S. Flynn

SUPREME COURT

Snow & Farnham vs. Edwin A. Smith	}	Ex. &c. No.5409
Meriden Cutlery Co. vs. Edwin A. Smith, et al.		
Horace A. Carpenter vs. Same	}	Ex. &c. No.5411
Rueckert Mfg. Co. vs. Same		
J. C. Taylor vs. Same	}	Ex. &c. No.5413
A. T. Wall Company vs. Same		

OPINION

(Before Judge Barrows Below)

SWEENEY, J. These are actions on the case brought under authority of Chapter 214, General Laws, 1909, which imposed a liability for corporate debts upon the officers and directors of manufacturing corporations who failed to comply with certain requirements there-in specified.

The several declarations allege that at the time when the Manchester Manufacturing Company, a Rhode Island corporation, ceased to do business it was indebted to each of the plaintiffs in a certain amount for goods sold and delivered.

It is further alleged that under the administration of the directors, of which the defendant was one, the indebtedness of said corporation was allowed to exceed the amount of its capital stock actually paid in and continued to exceed that amount until it ceased to do business; and that its indebtedness to the several plaintiffs was existing, or was contracted, when the said company was indebted in said amount in excess of its capital stock paid in.

It is also alleged that the defendant, as an officer and director of the Manchester Manufacturing Company, failed to have filed in the proper office the cer-

tificate required by said Chapter 214, stating that all of its capital stock had been paid in; that no such certificate was ever filed; and that the indebtedness to the several plaintiffs was incurred while the defendant continued to be such officer and director.

During the pendency of these cases, the defendant died testate and when the plaintiffs summoned the executor in to defend the latter demurred to the declaration and also moved to dismiss the cases on the ground that they did not survive the death of the defendant. The demurrers were sustained by the Superior Court and the plaintiffs have brought their bills of exceptions to this court.

The only question raised by the exceptions is whether these cases survive the death of the defendant, Smith.

The defense relies upon the case of *Moies vs. Sprague*, 9 R. I. 541, and the plaintiffs concede that it covers the point at issue here.

Moies vs. Sprague, supra, was an action brought against the administrator of the estate of a man who had been a director and president of the Union Horse Shoe Company, a Rhode Island manufacturing corporation, and was based on four promissory notes made by that corporation and held by the plaintiff. The second count charged the deceased with liability as a director for violation of the same section of the statute as that on which the first two counts of the declaration in the present actions are based. The third count likewise charged the deceased with liability under the same sections which are relied upon in the third and fourth counts in the present actions. The court held that the action did not survive. A reargument of the case failed to convince the court that its decision ought to be either reversed or modified.

The plaintiffs claim, however, that the language employed by this court in other and more recent cases has so weakened that case that it can no longer be regarded as an authority; and in

this connection they cite *Mott Iron Works vs. Arnold*, 35 R. I. 456; *Bullowa vs. Gladding*, 40 R. I. 147, and *Baker vs. Smith*, 41 R. I. 17.

The plaintiffs admit in their brief that *Mott Iron Works vs. Arnold* is not decisive of the merits of the cases at bar, but they quote from the opinion of the court in that case to the effect that the liability imposed on officers and directors by the statute is in the nature of the liability of sureties and as such is stricti juris and therefore subject to a strict construction, and from this they claim that the court meant that the cause of action thus created is in contract and not in tort. We can neither follow this argument nor adopt the conclusion to which it leads. This liability may be in the nature of the liability of sureties, in so far as it compels the delinquent officer or director, under certain conditions, to satisfy a creditor's claim, but it is nevertheless a liability imposed by statute. It is founded upon the misconduct or delinquency of the officer or director and not upon any liability assumed by him, which is an essential element in contract.

In the case of *Baker vs. Smith*, supra, the defendant contended that under Section 8, Chapter 357, General Laws, 1909, entitled "Of Fines, Penalties and Forfeitures," the plaintiff would be barred from recovering for any indebtedness incurred more than two years prior to the date of his writ. Upon that point this court said: "If the statute in question is penal in character it is not penal in the same sense as a criminal statute is penal," and further quoting from 2 *Thompson on Corporations*, 2nd Ed. Section 1326, "Whatever may be said of the penal nature of these statutes * * *, they are not penal in the strict and proper sense applied to statutes imposing punishment for offenses against the state * * * with reference to their nature and construction, the better and undoubtedly the correct, rule is that they are penal as to their construction and remedial as respects creditors."

While these two cases, *Mott Iron*

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Works vs. Arnold and *Baker vs. Smith*, are similar to the cases at bar in some respects, the question of the survivorship of the actions was not involved and the question whether the cause of action was in contract or tort was not raised, discussed nor decided.

In the case of *Bullowa vs. Gladding*, supra, this court held that an action for deceit in causing the plaintiff to purchase shares of worthless stock survived the death of the defendant, it being an action for damages as to the plaintiff's personal estate and therefore within the statute of survivorship. The whole cause of action was based on a direct property loss imposed upon the plaintiff. The present cases are not brought for damages to the personal estates of the plaintiffs, they are based on the violation of a statute which carries with it a right of action to creditors. We find nothing in these cases which can fairly be said to modify or

change the rule of law established in *Moies vs. Sprague*.

The exceptions of the several plaintiffs to the decision of the Superior Court sustaining the demurrers of the defendant executor to the declarations of the several plaintiffs are overruled

and the cases are remitted to said Superior Court for further proceedings.

For Plaintiff: E. C. Stiness, D. H. Morissey and C. J. Brennan.

For Defendant: Gardner, Moss & Haslam.

THE JUDGESHIP SITUATION

A number of new judges are likely to be named by the General Assembly at its session next winter. Governor San Souci has apparently decided that he has no authority to appoint a temporary successor to fill the vacancy caused by the death of Justice Doran. Many able lawyers, however, believe that under Sec. 5 of Art. VII of the Rhode Island Constitution there is no question as to the Governor's authority to fill all vacancies till the Legislature meets. The Governor did not ask an opinion of the Attorney General as to his right to appoint. So many factions would have to be appeased that the Governor probably concluded that it would be prudent on his part to avoid a scramble in which he would be the arbiter and accordingly took it for granted that he had no authority to appoint.

There is considerable agitation for the appointment of a Democrat to succeed Justice Doran. At the time the latter was appointed, eight years ago, the claim is made that there was an understanding that there should always be at least two Democrats on the Superior Court bench. The Republicans on the other hand contend that there was no such understanding—that there were two judges to be named at that time and it was decided to give one of

the berths to a Democrat, but not with the understanding that one of the places should be perpetuated for a Democrat.

The agitation for the selection of a Democrat and the fact that so many Republicans will be after the vacancy may result in the selection of two judges and possibly three at the next session of the Legislature. And if there is anything in the rumor that Justice Barrows is slated to succeed Judge Arthur L. Brown in the Federal Court in the event that the latter is elevated to the Circuit Court of Appeals there may be four judges to be appointed by the Assembly. Judge Brown would have a good chance of being elevated to the Circuit Court if Judge Anderson in Boston retires as has been talked of.

Justice Vincent of the Supreme Court will be eligible to retire by the time the Legislature convenes next winter and there is a strong possibility that he will do so. In that event a member of the Superior Court may be elevated to the Supreme bench, leaving still another vacancy in the lower court.

There are many candidates for a judgeship in the Superior Court. At the present time Assistant Attorney General A. A. Capotosto is said to be the most formidable candidate, but that means

Well-Read Lawyers

—may be seen going through their current copy of the Rhode Island Law Record as they enjoy their luncheon here.



Joseph H. Clark

EXAMINER OF

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very little, for so many things can happen between now and the convening of the Assembly that there is nothing certain about his chances. But he is well qualified for the position and has some strong backing.

Judge Nathan M. Wright, it is believed, could have a judgeship if he wanted it, but it is stated on reliable authority that Judge Wright is not looking for the job. He prefers to stick to his present position as Secretary of the State Central Committee, it is said.

Henry M. Boss, Jr., who had the backing of a good part of the bar at the time of the last vacancy, is said to have more political backing now. Lawyers feel he would make an ideal judge.

James T. Egan, John P. Beagan and George W. Greene are mentioned as Democratic candidates. Any one of these would fill the duties creditably. Felix Hebert and E. J. Daignault have been talked of as candidates of the French element.

19 - *located in 87*

Rhode Island Law Record

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Vol. 2, 1921/22



**A Periodical Devoted
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September 30th, 1921

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SUBSCRIPTION PRICE, \$15 A YEAR

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Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

AT THE EDITOR'S DESK

PLANS FOR THE YEAR

Commencing with this issue, the first of the 1921-22, year, The Rhode Island Law Record will publish each week the calendars of the Supreme and Superior Courts, including jury cases, district court appeals and miscellaneous docket, and also the full text of the opinions and rescripts of both tribunals.

Unlike the experimental period, covering the last three months of the last court term, the Law Record will not cease publication for the present term early next July, when the vacation recess begins, but will continue to publish till everything has been handed down by the Supreme Court for the year. After that if there is any rescript handed down by the Superior Court during the summer it will be printed in the first issue in the fall. Under this schedule our subscribers will have a complete file of all cases.

We launched our venture in getting out the Rhode Island Law Record at a time when most of our subscribers were receiving the Supreme Court opinions and Superior Court rescripts through other sources and accordingly we did not feel that our omission to publish the Supreme Court opinions that came down after our last issue in the summer would cause any serious inconvenience. But now that the lawyers have given their support to the Law Record, we are fully alive to the obligations we owe to the members of the bar and will endeavor to fulfill them to the best of our ability. Accuracy, promptness and efficiency will be our watchwords.

We will welcome any criticism that is designed to improve the service to the bar as a whole. The publication is by no means perfect, but with the helpful suggestions we expect and that the solid support already given by the attorneys, the Record can be brought to a level where it will render a real, substantial service to all subscribers. From time to time brief articles of interest to the legal fraternity of this state will be printed. Our subscribers and all others who have made the publication a success have our sincere thanks.

THE PUBLISHERS.

Digest of Superior Court Rescripts and Statute Annotations

To the end that the Superior Court rescripts printed in the Rhode Island Law Record may be of maximum value to our subscribers, we plan to issue at the end of each court year a digest to be compiled by a lawyer well qualified to do the work. It will be furnished without cost to each subscriber. Beginning with this issue the pages will go on consecutively through the year; that is to say, the number of the first page of issue No. 2 will continue from the last page of issue No. 1. This arrangement was suggested in the interests of the digest and annotations.

Some of our subscribers are having their statute books annotated each year with reference to the public laws, the Rhode Island reports and the Superior Court rescripts. We wish to announce that the Rhode Island Law Record may, upon request, be included in the annotating references insofar as the Superior Court rescripts are concerned. Information regarding the annotation of the statutes will be gladly sent upon application.

THE PUBLISHERS.

Supreme Court Calendar

MONDAY, OCTOBER 3, 1921

Ex.5478. J. H. M.	Dr. Fred A. Coughlin	R. I. Co.	C. W.
C. & C.			
M.P.360. F. J. R.	Frank J. Rivelli et al.	Prov. Gas Co.	Atty. G. and S. K. & S.
M.P.362. J. H. A. G.	Laurence Legris, doing business as Grant Motor Sales Co.	Israel Chernick	

WEDNESDAY, OCTOBER 5, 1921

Ex.5522. Coon. & C.	Francesco Librandi	Anastatia P. O'Keefe	Com. & Can.
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FRIDAY, OCTOBER 7, 1921

Ex.5500. B. & M.	Herbert C. Lawton	Newport Indus. Co.	M. L.
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Supreme Court Motions

MONDAY, OCTOBER 3, 1921

Eq.524. L. B. & M. Herbert G. Sayer	Clark Sayer Wall, Inc.	R. W. G.
		J. B. L.
		S. D. P.
S. & H. W. H. W. H. Briggs et ux.	Manuel Silveira et ux.	G. H. & A.
Ex.5440. S. J. C.		
W. C. & C.	Owen P. Lee	E. B. Jones et al.
Eq.517. B. W. G.	D. M. Bova et al	B. W. G.
Ex.5524. W. H. W. Ida M. Handy	Antonio Buonanno et ux.	B. C.
J. L. C.	Ida M. Arnold, alias	

ALL ASSIGNMENTS

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, OCTOBER 3, 1921

Eq.5088. W. L. Frost	F. O. Littlefield	J. R. Armstrong et al.	Q. & K.
47526. J. F. Collins-	Alfred F. Hassett	Benj. F. Lindemuth	W. & G.
K.			

TUESDAY, OCTOBER 4, 1921

Eq.5271. Stiness	Edward C. Stiness	D. H. Henderson et al.	W. & G.,
Kent. F. & H.	Idella La Chapelle et al.	Sarah Brown, Pre. Inj.	

WEDNESDAY, OCTOBER 5, 1921

Eq.4395. Casey	Mary J. Gilbane	Union Trust Co.	G. M. & H.
Eq.5232	Emma H. Kimball	Mass. Accident Co.	

Jury Trial Calendar

MONDAY, OCTOBER 3, 1921

47170. W. & W.	Luther S. Newell	Anchor Webbing Co.	Lapham
48015. P. Romano	Frank V. Tuzio	Martin Leo Kiernan	West
47357. Coon. & C.	Domenico Amatore	Peter J. Caldarone	P. & DeP.
46447. C. R. Easton	Muriel L. Walling	Isabella Mathewson	S. & L.
46448. C. R. Easton	Arabella Walling	Isabella Mathewson	S. & L.

TUESDAY, OCTOBER 4, 1921

43546. H. D. G.	Charles J. Daly	Ruth Mathewson	Wildes
48123. R. T. B.	William M. Carnoe	Charles F. Place	T. Curran
47869. Coon. & C.	Pincus Woffenstein	Joseph Bida	R. & R.
50210. C. & C.	Carmine D'Erico	Emogene Ewald	Walsh

WEDNESDAY, OCTOBER 5, 1921

43683. P. C. Joslin	Cadillac Auto Co. of R.I.	Frank C. Pettis	F. & H. S.
48353. Johnson	Solon Creamery Co., Tr.	Louis Simon	R. & R.
42771. McSoley	Sarah A. Wilbur	Joseph A. Latham et al.	M.&M., R. J.
42770. McSoley	Henry F. Wilbur	Joseph A. Latham et al.	M.&M., R. J.
36982. T. & C.	Helen M. Scott	Henrietta A. Longley	W. & G.
49137. Coon. & C.	Colonial Dress Co.	Cherry & Webb	G. H. & A.
46827.	Stanley Boochick p. a.	Oswegatchie Tex. Co.	E. & A.

THURSDAY, OCTOBER 6, 1921

47864. J. E. B.	Frank Santos	Antonio Santos	Vance
49999. C. & O'C.	Barnard Larsen	Herbert Addy	L. F. Nolan
50000. C. & O'C.	Barnard Larsen	Benjamin F. Addy	L. F. Nolan
49034. R. G. E. H.	Henry A. Goulet	Herbert E. Stearns	Osterman
48039. Coon & C.	John J. Guirk	John Dallas	B. & C.
49585. G. M. & H.	Food & Chem. Prod.	Army & Navy Sales Co.	Bronson
48723. H. A. Baker	Geo. Litchman	A. L. Sayles & Sons Co.	C. & C.

FRIDAY, OCTOBER 7, 1921

49804. J. Ousley	Alphee Leblanc	Simon Frechette	Dorney
49925. J. Ousley	Angelina Amison	Mark Leslie Hough et al.	Barnefield
49789. Slocum	Henry D. Goldman	William Rabinowitz	R. & R.
49597. G. M. & H.	John Travares	Fred A. McCabe	J. T. W.
43864. Corcoran	Robert M. Cohen	Rhode Island Co.	W.-S.
41746. B. C.	Anthony Cianci	United W. & Sup. Co.	Jones
49044. Coon. & C.	Mary Mediros	Roland Arter	W. & G.
48572. W. M. P. B.	T. F. Hunt	Herbert L. Richards, Adm	

District Court Appeals

MONDAY, OCTOBER 3, 1921

51362. J. J. Mee	Louis Cassavant	Annie M. Nathanson, Appt	Daigneault
45443. Burchell	Wenseallau S. Almeida	John F. Walsh, Appt.	Wildes
48556. Costello	Karaken Badarosian	Hagop Surmeian, Appt.	Coon. & C.
50039. J. Rustigan	N. E. Pants Mfg. Co.	A. S. Green	R. & R.
50042. C. S. Slocum	Emilia Lavalley	John D. Suttell, Appt.	W. R. Champlin
50044. R. & R.	Philip Goldstein Co.	B. Kapstein, Appt.	
50050. E. C. S.	United Limb & Brace Co.	Samuel Priest, Appt.	I. Marcus
49244. Slocum	Millers, Inc.	Herve J. Legace	Finklestein
47444. Coon. & C.	Wales Add. M. Co., Appt.	Rocky Point Amuse. Co.	Joslin
49491. Stiness, M.B.	Harry Smith, Appt.	Charles T. Pierson	J. B. E.
50547. W. C. & C.	Samuel Sillman	Benj. Mellion, Appt.	P. V. Marcus
50556. A. G. C.	Charles F. Clewley	Jordan M. S. Co., R.I. Appt	Heathman
49480. Alexander	Louis Rogepoky	Benj. Bronstein	B. & B.
48069. W. M. P. B.	Margaret A. Thornley	Anna R. Handy, Appt.	C. J. O'Connor
50029. M. & T.	American Nat. Co.	Peoples Furn. Co.	Conaty

TUESDAY, OCTOBER 4, 1921

45444. Burchell	Peter Cabral	John F. Walsh, Appt.	Wildes
49748. W. W. O.	Warner Aland, Appt.	H. J. Mickler	Dorney
49854. Stin. M. B.	Jeanette Doll Co., Appt.	B. & F. Novelty	R. & R.
47043. J. H. R.	Sam Golden	M. S. Salden	C. & O'C.
49987. R. & R.	Benj. H. Moskol, Appt.	Henry Priest	B. S. & L.
49988. R. & R.	Samuel H. Makol, Appt.	Henry Priest	B. S. & L.
50046. R. & R.	Suano Lombardi	Charles H. Wagner, Appt	E. D. H.
35436. G. P. & T.	Regal Shoe Co., Appt.	Joseph M. Baird	Dorney
49561. P. & DeP.	Antonio DiBiano	Abraham Lupf, Appt.	J. C. S.
49063. Costello	Hamilton B. Shoe Co.	Archie's Shoe St., Appt.	J. G. Connolly
48366. W. & G.	William J. Orrell Co.	A. B. Harrington, Appt	Alexander

49281. Stin. M. B.	A. W. H. Oil Co., Appt.	Arctic Auto Sup. Co.	C. C. & McC.
49732. W. & G.	Phillips Lead & Sup. Co.	Henry J. Bannon, Appt.	J. & K.
50599. E. C. S.	S. Silberstein & Co., Inc.,	B. Dabinsky	Horenstein

WEDNESDAY, OCTOBER 5, 1921

50314. H. E. & M.	Exchange Real Est. Co.	Anaslbrassio DeBassio, A.R. & R.
49758. Stin. M. B.	D J. Napoli & Co., Appt.	S. Tourtellot & Co. McG. & S.
47808. W. M. P. B.	John Kirconnell, Appt.	Samuel Moore F. & H.
47809. W. M. P. B.	Ellenor E. Miller, Appt.	Samuel Moore F. & H.
50016. C. S. S.	H. Epstein	Jacob Tannenbaum, Appt. B. & B.
50045. Stin. M. B.	Outlet Co., Appt.	Wm. A. Cusick, Pro se ip.
44753. Easton	Emily Manton, Appt.	Walter L. Clarke, C. T. Chace
48521. Rickard	Fred P. Fenton	Giuseppe Achille, Appt. Jones
49261. LeCount	Myer R. Armstrong, Appt.	Adolphus Rotenberg R. & R.
49469. McG. & S.	John S. Fiore	Michele Mandella, Appt.
46057. Cianciarulo	A. & M. Corrente, Appt.	Annie Cunningham P. C. Cannon
49241. P. & DeP.	Thomas Ricci	John Neilan, Appt. C. & C.
50542. McH. & S.	Maurice Greenwald	Dave Sundlun, Appt. R. & R.
47784. Slocum	Joseph A. Hull	Chas. Wells, alias Appt. Stockett

THURSDAY, OCTOBER 6, 1921

51107. M. & T.	Edith R. Wall	Francis R. McKenna, Ap. McSoley
49763. Stin. M. B.	A. B. Mfg. Co., Appt.	N. E. Glass Wks. P. V. Marcus
49451. O'Connor	Anna E. Roper, Appt.	Charles F. Jenkins, alias R. & R.
49745. McK. & B.	Henry N. Bebeau	Sarah Janigan, Appt. Rustigian
50022. S.-O'R.	Stand. Stl. Mot. Car Co.	I. W. Frankel, Appt. Lynch
49476. L. B. & McC.	James J. Duffy, Appt.	Edward F. Cooney R. & R.
45820. P. & DeP.	Gennaro Anorato	Antonio Toti, Appt. J. & M.
50311. J. H. Coen	Huck McGuckian	A. Lury, Appt. R. & R.
49958. Stin. M. B.	Louisa Berger	John J. Hursch, Appt. Brand
49265. E. C. S.	Bragdon Lord & Nagle	Prov. Dye Works Brothers
	Co., Appt.	
48894. E. C. S.	N. E. M. & El. Co., Appt.	Prov. Dye Works Brthters
50501. Chaffee	J. W. DeWolf	Pasquale DiPrete M. H. & G.

FRIDAY, OCTOBER 7, 1921

49759. Stin. M. B.	Smyrna Fruit Co., Appt.	Un. Wholesale Groc. Co. P. & DeP.
48970. Hicks	Arsene B. DesRoches	Todd-Mellor Co., Appt. R. & R.
48617. Gunning	Z. Zawatsky & Son, Appt.	NY, NH & H RR Co. Barnett-S.
48454. Nathanson	Jacob Hilbron	Biltmore S., Inc., Appt. B. & B.
49447. P. & DeP.	George A. Combe, Appt.	C. E. Wilkinson, Pros se ip
43403. B. C.	Henry P. Porter, Appt.	Ellen G. O'Leary C. & Coon.
48861. Johnson	D. Auerback & Son	Horowitz Bros. R. & R.
50194. Appleton	Harriet D. Ramsdell	John F. McGair, Appt. Brothers

JOHN J. ROSENFELD—DANIEL T. HAGAN

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POINT INVOLVING CLIENT'S RIGHT TO SETTLE DIRECTLY

A decision of considerable interest to the members of the bar is the subjoined rescript handed down by Presiding Justice Tanner of the Superior Court in the \$10,000 suit brought by John P. Brennan, attorney, with offices in the Grosvenor building, against John R. White & Son, Inc., on account of a settlement counsel for the White people made with one of Attorney Brennan's clients.

A laborer named Davis employed by the White company is claimed to have been permanently injured in the course of his employment and he engaged Mr. Brennan to sue the concern. Mr. Brennan started suit to recover \$75,000 for his client on Aug. 20, 1917. Attorney Brennan in his own suit to recover \$10,000 as counsel fees avers that John R. White & Son, Inc., "collusively and fraudulently" adjusted Davis's claim for the unconscionably low sum of \$400 with Davis personally and in the absence of his attorney, Mr. Brennan.

Davis at the time, it is stated, was in deplorable circumstances, mentally, physically and financially, and was not capable of making a fair settlement. Philip S. Knauer of the law firm of Knauer, Hurley & Fowler, is counsel for Attorney Brennan. Gardner, Moss & Haslam are counsel for John R. White & Son, Inc.

Mr. Knauer is also attorney for Lawyer Joseph C. Cawley in the latter's suit to recover counsel fees as attorney for Miss Baxter in her breach of promise suit against Burke. The Supreme Court has already handed down an opinion in this case, but the decision, according to Lawyer Knauer, did not destroy

the right of action and he is planning to amend his allegations in order to set forth what sum, according to the plaintiff's "information and belief," was paid to Miss Baxter by Burke. This was not originally done because the exact figures were not in the plaintiffs possession.

A client has a right to make a bona-fide settlement with the opposing side, it is recognized, but in the Brennan-White case it is asserted by the plaintiff that it was not a bona-fide settlement. Moreover, the plaintiff in this case says that he was not protected in accordance with the attorney's lien act to the extent of the \$400 settlement. Further pleas are likely to be heard in the Superior Court and then the case may be taken to the Supreme Court.

Judge Tanner's rescript, handed down just before the summer recess, reads as follows:

John P. Brennan	} Law No. 42328
vs.	
John R. White & Son, Incorporated	

RESCRIPT

June 24, 1921

TANNER, P. J. This is heard upon demurrer to the defendant's second plea to the amended declaration.

The amended declaration alleges that plaintiff, an attorney, and one Charles Davis entered into the relationship of attorney and client by an express contract for service in respect to an action of said Charles Davis against the defendant company for injuries alleged to have been caused by the negligence of said company; that under said express contract between said Brennan and said Davis, Brennan had full power to settle or prosecute a suit against said company for said injuries and was to receive for his services an amount equal to one-half the value of the cause of

action as determined by verdict or by any settlement of said cause effected by said Brennan, that said defendant company had notice of said relationship between said Brennan and said Davis, and that said plaintiff brought action for said cause against said defendant company, and that said defendant and said Davis did collusively and fraudulently adjust the case of said Davis against said company for an unconscionably low price, to wit: the sum of \$400; that said Davis was in such deplorable circumstances mentally, physically and financially that he was not capable of making a fair settlement and acted under duress of circumstances in so doing; that said plaintiff gave said defendant company, prior to said settlement, notice that he should hold it responsible for the full amount of his claim for services according to his agreement with said Davis; that said plaintiff never consented to said settlement but prohibited it.

Plaintiff therefore seeks to recover the amount to which he is entitled by the said agreement between himself and said Davis by virtue of the statute of attorneys' liens.

We understand plaintiff's action, therefore, is based upon the theory that said settlement was void as to him because of the inability of said Davis to make a settlement under the circumstances of duress in which he was placed, and that the plaintiff therefore considers himself to be entitled to an action under the lien statute to recover one-half of the value of a fair verdict by Davis against said defendant company.

The defendant in said second plea alleges that said settlement between itself and said Davis was not fraudulent as alleged in the plaintiff's declaration, but was a fair and reasonable settlement that the plaintiff was notified

to be present at said settlement, and was told by said defendant that he would be protected in getting a proper fee from said David for his services, but that said plaintiff declined to be present and notified said defendant that he would hold it liable for his fee under the attorney's lien law.

The plea of defendant goes on to recite the filing of said settlement in court in the case of said Davis against said defendant and alleges that said plaintiff is now estopped to deny the validity of said settlement.

We think that the plaintiff would be estopped to deny the validity of said settlement if he had not alleged that said settlement had been obtained by duress and fraud upon said Davis. We do not think that said Davis was estopped by his agreement with said plaintiff, Brennan, to make a fair settlement with the defendant. The agreement between said Brennan and said Davis that Brennan should control the settlement of the case absolutely was, we think, void as against public policy.

Snyder vs. DeForest Wireless Tel. Co., 190 N. Y. 66.

No. Chicago St. Rv. Co. vs. Ackley, 171 Ill. 100.

Tyler vs. Superior Court, 30 R. I. 107.

We cannot go with the defendant so far as to say that the plaintiff has waived his cause of action by declining to participate in said settlement. He certainly did not acquiesce in it, nor did he obtain other security in place of his lien.

We do not think, therefore, that the plaintiff is estopped as claimed in the plea. If the plea had merely denied fraud and duress in obtaining settlement and had concluded to the contrary, we might have sustained the plea, but the plea apparently relies mainly upon

the estoppel and concludes with a verification of the new matter of estoppel.

We therefore feel obliged to sustain the demurrer to the plea.

For Plaintiff: Knauer, Hurley & Fowler

For Defendant: Gardner, Moss & Haslam

SUPERIOR COURT

George T. Stewart }
vs. } Div. No. 13439
May F. Stewart }

RESCRIPT

September 22, 1921

SUMNER, J. This is a petition for divorce alleging desertion, extreme cruelty and that the parties have lived separate and apart for more than ten years. The only ground urged at the hearing was that of living separate and apart for ten years. Respondent was not represented by counsel.

Petitioner testified that after finding and reading some letters written by his wife in 1903, he warned her to leave him, and that after this time, they did not live together as husband and wife; that in February, 1911, she went to Europe, he urging her to get a divorce; she returned to this country in 1914, going back to her husband's house; that there were three apartments in her husband's house and she lived in one of them, though not as his wife, until late in 1915 or 1916, and then left his house and has not since returned.

The statutory provision relied on by the petitioner is contained in Sec. 3, Chap. 247, of the General Laws, as follows:

"Whenever, in the trial of any petition for divorce from the bond of marriage, it shall be alleged in the petition that the parties have lived separate and apart from each other for the space of at least ten years, the court may, in its discretion, enter a decree divorc-

ing the parties from the bond of marriage.

Petitioner claimed that the requirement of living separate and apart was complied with by their failure to live together as husband and wife, even though they were living in petitioner's house together, although occupying different apartments.

Webster's New International Dictionary defines the word "separate" as follows: Divided from another: not united or associated; being apart from others; alone; solitary. It also gives the following definition of the word "apart": separately in regard to place or company; in a state of separation as to place.

In *Camire vs. Camire*, Atl. Rep. Vol. 113, page 748, the Rhode Island Supreme Court says, referring to this provision: "In the statutory provision in question, the intent of the General Assembly appears that when a husband and wife have lived separate and apart for ten years, there is little prospect of reconciliation between them, and that then, after such ample time for a reconciliation has been given, either should be allowed to appeal to the discretion of a justice of the Superior Court, asking that they be free from a bond which is no longer beneficial to them or society."

It is a cardinal question then, in this case, whether the parties were so separate and apart during the period of ten years as to allow the court to find that there was no prospect of reconciliation between them. Whether the parties, living as they did, had any friendly relations, either by word of mouth or otherwise, did not appear in the testimony.

In the absence of any explicit pronouncement of law on this statute, the court feels that the use of the two

words "separate" and "apart," meaning, as they do, nearly the same thing, was intended to emphasize the separation or disconnection of the two parties, and that the mere failure to maintain marital relations was not, under the circumstances, a living separate and apart as contemplated by the statutes.

The petition for divorce is accordingly denied and dismissed.

For Petitioner: John L. Curran

For Respondent: Flynn & Mahoney

SUPERIOR COURT

William Hunter }
vs. } Workmen's
Gorham Mfg. Co. } Compensation
Petition No. 217

RESCRIPT

September 20, 1921

TANNER, P. J. Medical testimony in the case is to the effect that it is improbable that the petitioner could have received his injury during his employment, as he claims, and continued to work as he did. The burden is upon the petitioner, to show that he was injured during the course of the employment. Under the testimony he has failed to do this; we therefore are obliged to deny the petition.

For Petitioner: Cushing, Carroll & McCartin.

For Respondent: Ralph T. Barnefield

One More Word About That New Courthouse

There might be some doubt as to the advisability of calling the attention of the bar again to the need of a new courthouse for the Superior Court and better accommodations for the lawyers and other persons having business at the county court, were it not for the fact that many an apparently hopeless cause has triumphed by reason of continued agitation in its behalf.

Legislatures seem hard to impress when it is a matter of furnishing adequate accommodations for the Superior Court. There is need of a complete reconstruction of the present building and an addition to it, or, what would be much better, a real new structure.

While the clerk of the Superior Court has shown himself to be something of an architect and a great discoverer of nooks and niches for holding papers and other records it would seem as if his ingenuity would be severely taxed soon to secure the most necessary accommodations.

As all lawyers know the conditions with respect to accommodations for holding grand jury sessions are deplorable. Witnesses are forced to sit around in the open corridors all day waiting to be called to give testimony.

GEORGE F. O'SHAUNESSY

FORMERLY COLLECTOR OF INTERNAL REVENUE

AND

PETER C. CANNON

FORMERLY UNITED STATES DISTRICT ATTORNEY

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**A Periodical Devoted
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October 7th, 1921

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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 2

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

AT THE EDITOR'S DESK

Many lawyers are awaiting with considerable interest the disposition of the first appeal to come up before Judge Hahn in the Superior Court in a case where the District Court imposed a jail term on a defendant for driving an automobile while intoxicated.

All of the motorists who were given jail penalties for operating a machine while drunk took appeals in the hope that some arrangement might be made to avoid the jail feature of the sentence. It is understood, however, that the Attorney General's department will not recommend to the court the substitution of a heavy fine for the jail term.

The attitude of the Attorney General's department is that all these cases should be presented to a jury for determination unless the defendant is willing to submit to the same sentence that was imposed in the lower court. This being so, it is likely that the majority of those awaiting disposition of appeals involving the serving of jail terms for

operating a machine while drunk will go to trial.

The interesting question for the jury will be whether or not the odor of liquor on a man's breath is sufficient to prove he was intoxicated. Some men arrested on the charge of driving while intoxicated claimed they had taken only one or two drinks, but just because they happened to have an accident the police charged them with being drunk. Before the District Court began imposing jail terms in addition to fines the defendants invariably paid the fine when the case came up on appeal. There are a number of defendants who probably will admit they had taken several drinks of liquor before starting out to drive, but claim that they were not drunk and that the accident that befell them would undoubtedly have happened even to any man who had not taken a single drink.

The Attorney General's department realizes that a remittance of the jail term on appeal in these cases would be bad policy and make the law relative to jailing motorists for driving while drunk a dead letter. So it is believed that the lawyers defending clients charged with this offence will fight it out before a jury and some interesting legal battles may be looked for.

Supreme Court Calendar

MONDAY, OCTOBER 10, 1921

Eq. 473. F. & H.	Riley Duckworth vs. Walter L. Kelley	B. & C.
Ex.5497. J. G. L.	Edmund Sawyer vs. Thompson's Exp. Co.	H. W. K.
J. H. M.		
Ex.5478. Coon & C.	Fred A. Coughlin vs. Rhode Island Company	C. W.

WEDNESDAY, OCTOBER 12, 1921 (Columbus Day)

FRIDAY, OCTOBER 14, 1921

Ex.5520. M. W. C. H. M. Howe vs. Frank H. Swan et al.	H. E. E.
I. M.	
M.P.364. P. C. J. Leo Glass vs. State Board Public Roads	C. P. S.

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, OCTOBER 10, 1921

49650. W. A. G.	H. Zuckesberg vs. Ohio F. Ins. Co.	F. Herbert
Eq.5565. H. E. & M. R. E. Emerson vs. L. M. Wilcox Cal. Co.		
Assign.		
168. E. C. S.	In re-assignment of Stanley Lindley	
Eq.5570. Q. & McK. D.	Monocchio vs. I. Ducalsky et al.	
Eq. 5571. G. E. & C. T. J. Sullivan et als. vs. Sullivan's Mot. Ex., Inc.		
47526. J. F. Collins	A. F. Hassett vs. B. F. Lindemuth	W. & G.
50744. Rich	M. E. Haynes vs. A. S. Green	Casey
Eq.5559. H. E. & M. I. A. King vs. Indiana Mot. Sales Co.		
47170. W. & W.	L. S. Newell vs. Anchor Web. Co.	W. & G.

TUESDAY, OCTOBER 11, 1921

Eq 5479. G. F. Troy	A. Paolilli vs. Nicola Piscitelli	
50188. W. A. Gun.	Bernsteins, Inc., vs. Gr. East. Cas. Co.	L. B. & M'C.
50694. P. V. Marcus	L. Brochner vs. Jos. Butler	E. C. S.-M.
50820. P. & DeP.	A. DeSimone vs. A. Sinapi	E. M. Sullivan
51170. T. L. Carty	F. Bertoncini et al. vs. M. Shey	S. Nathanson
51185. Bennett	P. Morkiman vs. W. C. Toner et al.	J. G. Connolly
Eq.5575. Pettine	Manuel Armisida vs. Manuel Meduris et al., Pre. Inj.	
50171. H. E. & M.	Donald Mackey vs. Dimond Co.	Joslin-M.
Eq 4395. Casey	M. J. Gilbane vs. Union Trust	G. M. & H.
Eq.5232. Mat'son-B.	E. H. Kimball vs. Mass. Accident Co.	

WEDNESDAY (COLUMBUS DAY)

No Assignments

Jury Trial Calendar

MONDAY, OCTOBER 10, 1921

49638. B. S. & L.	City of Providence vs. James Scotti	P. & DeP.
49678. P. & DeP.	James Scotti vs. Oakland Cemetery Co.	B. S. & L.
49346. R. & R.	City of Providence vs. Morris H. Rubin	E. D. V. O'C.
49347. R. & R.	City of Providence vs. Morris H. Rubin	E. D. V. O'C.
50219. G. M. & H.	George H. Davis vs. Weybosset Pure Food Mkt.	R. T. Barnef'd
50220. G. M. & H.	Lizzie L. Davis vs. Weybosset Pure Food Mkt.	R. T. Barnef'd
45081. P. & DeP.	Rosina Cortelessa p. a. vs. Salvatore Simonetti	J. E. Dooley
44708. C. & Cooney	Antonette Fascia vs. Angelo Simone	P. & DeP.
49151. Q. & K.	Emma Freethy vs. Oscar Schonhardt et al.	F.&N. W.&W.
46766. Romano	Salvatore Simone vs. L. H. Staffin	D. P. MacD.

TUESDAY, OCTOBER 11, 1921

49411. McG. & S.	Nora Crowley vs. Herbert B. Pettee	J. H. A. G.
40251. P. C. Cannon	Catherine T. Sullivan, Adm., vs. John H. Sullivan	W. H. McS.
49692. C. & DeS.	Gennaro Manfredo vs. Joseph McCormick	C. & C.
49904. F. & H.	Arthur Willis p. a. vs. Isaac Saunders, et al.	B. & B.
46104. P. & DeP.	Domenico Ferrara vs. Teresa Ferrara	J. V.
50141. C & Canning	Baird & North Co. vs. American Railway Exp. Co.	G. H. & A.
42319. F. & H.	Morris Bezzan vs. Rhode Island Company	C. W.-W.
42320. F. & H.	Ida Bezzan vs. Rhode Island Company	C. W.-W.

WEDNESDAY, OCTOBER 12, 1921

Columbus Day—Legal Holiday

THURSDAY, OCTOBER 13, 1921

A. B. West		
45637. W. A. Gun'g.	Alice Drowne vs. Nicola Snavo	Cooney & C.
45638. W. A. Gun'g.	Louise A. Watts vs. Nicola Snavo	Cooney & C.
45639. W. A. Gun'g.	Raymond Watts p. a. vs. Nicola Snavo	Cooney & C.
43580. T. J. Dorney	John Reffkin vs. S. Willard Thayer	Barnefield
49863. B. & B.	Isaac Beck vs. Leo R. Boudron	J. L. Curran
49939. J. Rustigian	Novbar Junedorais vs. Manoog Bagdasarian	C. A. Walsh
49330. A. & A.	Phillippe Lafrance vs. Michele Paliano	C. & D-S.
48500. W. & G.	Anna Schauf vs. Nicholas J. Perdkis et al.	R. T. B.
40646. McMG. & S.	Ernest G. Allen vs. Rhode Island Company	Whipple-S.
46227. C. C. & Mc.	Augustus S. Bartlett vs. Benjamin Lodge	F. & H.

FRIDAY, OCTOBER 14, 1921

49533. G. F. Troy	Giuseppe Pizzi vs. John D. Avedisian et al.	M. H. & G.
49622. F. & H.	Harold C. Pearson vs. Arthur Lepper	C. & O'C.
49812. M. H. & G.	Michele Mandella vs. Francesco Cataldo	R. & H.
49813. C. & O'C.	Francesco Cataldo vs. Michele Mandella	G. H. & A.
49895. J. Ousley	Dewey E. Guertin vs. Clarence Elderkin	C. & Hart
49898. F. A. Jones	Ross B. Hooker vs. Mach. & Chem. Eq. Co.	J. G. Connolly
46659. P. & DeP.	Donato DePalma et ux. vs. Fred Martel et al.	C. W.-W.
43209. F. & H.	Nunziato Del Pizzo vs. Rhode Island Company.	

District Court Appeals

MONDAY, OCTOBER 10, 1921

50360. F. & H.	Byron H. Waterman, Jr., Appt. vs. George A. North	T. & C.
50522. Brennan	Libero Bernadini vs. Frank T. Sibley, Appt.	Ousley
46360. Costello	Warren, Allen Carpet Co. vs. Harry Cohen, Appt.	Corcoran
49853. Stiness-M-B	Chalmers Knitting Co., Appt., vs. Blazar Bros.	R. & R.
49558. P. & DeP.	Angelo Compagnon vs. James A. Vendittuoli	D. A. Colton
47426. A. & A.	John Petras vs. M. Daly, Appt.	Troy
48396. Stiness-M-B	Vulcan & Reiter, Appt., vs. S. K. Merrill Co.	L. B. & McC.
42445. Stiness-M	Christman Piano Co., Appt., vs. Thomas Kennedy	J. G. Lace
48890. E. H. Z.	Otto K. Paquin, Appt., vs. Rhode Island Company	H. K. Eklund
50056. Grim	No. Attleboro Fdy. Co., Appt. vs. E. A. Eddy Ma. Co	W. & Greenl'w
30122. J. F. Conaty	Giovanni Cardelli vs. Simone Imondi	E. M. Sullivan
49728. Walling	W. J. Cornell Co., vs. Millers, Inc.	Wildes
50302. B. & B.	Isaac Beck vs. H. Hecker, Appt.	R. & R.
49231. Bellin & B.	Carl A. Anderson, Appt., vs. A. J. McDonald	J. C. Cawley
46770. W. M. P. B.	Mary Petrolino, Appt., vs. Luigi Petrolino	B. C.
49754. C. C. R.	Burton Elliott vs. Walter E. McGoniele	West-C.
50920. Com. & Can.	Margaret T. Kearney vs. George Abdo, Appt.	B. & B.
51362. J. J. Mee	Louis Cassavant vs. Annie M. Nathanson, Tr. & Ej.	Daignault
50547. W. C. & C.	Samuel Sillman vs. Benjamin Mellion, Appt.	P. V. Marcus

TUESDAY, OCTOBER 11, 1921

51339. F. L. Owen	James A. Vendittuoli vs. Michael Hartnett, Appt.	J. Coen
49686. McKiernan	L. P. Bosworth vs. Gertrude A. Stearns	Bullock
49738. A.S. & A.P.J.	Jacob Brothers Co. vs. Joseph Silver, Appt.	J. C. Semon'ff
49765. Stiness-M-B	Henry W. Hamberger Co., Appt., vs. Max Deutz	R. & R.
49851. Stiness-M-B	Apco Mfg. Co. vs. Millers, Inc.	Wildes
45683. C. S. Slocum	Jos. Celone vs. Peter Roberts, Appt.	Cooney & C.
49304. F. F. Vance	Julia Farrv vs. Nicolina Barrone, Appt.	J. C. Semen'ff
44632. A. & A.	George Robert vs. Arthur B. Harrington, Appt.	Alexander
49764. Stiness-M-B	The Allen School. Appt., vs. Cora H. Mercer	Q. & Kiernan
49827. Stiness-M-B	J. Levenstein & Co. vs. Prov. Dye Works, Appt.	Brothers
49829. Stiness-M-B	Young Brothers vs. Prov. Dye Works, Appt.	Brothers
45893. P. & DeP.	John Miller vs. Ann Hanley, Appt.	J. L. Curran
50864. T. H. Holton	Joseph Prerancenzi vs. Luigi Cipriano, Appt.	Veneziale
51311. I. S. H'nst'n	Ernest F. Rueckert vs. Isaac C. Nicholson	
50936. Ziegler	Conrad Beroug vs. James P. O'Neil, Appt. Tr. & Ej.	F. L. Owen

WEDNESDAY, OCTOBER 12, 1921

Columbus Day—Legal Holiday

THURSDAY, OCTOBER 13, 1921

49770. Stiness-M-B	Rocco Perretta & Co., Appt., vs. Ventrone & Co., Inc.	P. & DeP.
49786. Stiness-M-B	Phillips-Jones Corp. vs. I. Ferris	T. F. Corcor'n
28080. B. & Lee	Carl H. Budlong vs. Robert C. Carr, Appt.	T. M. O'R.
48045. J. Veneziale	Pasquale Simone vs. Raffaele Ibello, Appt.	W. M. P. B.
49496. W. C. & C.	Harrie L. Fales vs. Benjamin B. Manchester, Appt.	Rosenfeld
49268. R. G. E. H.	Nathan Sallinger vs. John J. Phillips, Appt.	Osterman
49774. Stiness-M-B	Charles J. Jager, Appt., vs. Jesse Silva	J. S. Neves
50420. L. B. & McC.	James V. Crofton vs. John Cronan, Appt.	D. A. Colton
50553. W. R. P.	Charles W. Frasier, Appt., vs. Edward F. McKenna	G. F. Troy
50567. J. G. LeC.	Julius J. Robinson vs. Avedis D. Maljamian, Appt.	J. Rustigian
50457. Stiness-M-B	George T. Hoyt Co., Appt., vs. Jules T. Guerin	G. Myette
51299. G. M. & H.	Charles Phifer vs. J. Solomon Harris	C. S. Slocum

FRIDAY, OCTOBER 14, 1921

51045. R. & R.	Israel L. Edelstein vs. J. Soloman Harris, Ap.,T.&E.	C. S. Slocum
51296. J. S.-O'R.	Emma M. Donnelly vs. Elmer S. Umstead	S. K. & S.
49756. Stiness-M-B	Chas. A. Krause Mill. Co., Appt., vs. Met. W. G. Co.	McG. & S.
49700. Stiness-M-B	Correct Skirt Co., Appt., vs. B. Sherman	R. & R.
49473. C. R. Ballou	Eric H. Burgess vs. Shmay Kotler, Appt.	Wildes
49249. C. S. Slocum	Franklin Auto Sup. Co., Inc. vs. N. Eugene, Appt.	P. & DeP.
48607. Slocum	Samson Auto Top & Eq. Co. vs. R. G. Davis, Appt.	L. B. & McC.
50308. P. V. Marcus	Providence Cap Co. vs. A. Sidelinkoff, Appt.	G. Helford
50361. P. & DeP.	Antonio Anastasi vs. Yaar Dardenais	Dorney
49102. R. G. E. H.	Nathan Sallinger vs. Ernest M. Irving, Appt.	D. A. Colton
48456. R. & R.	Isaac Weinbaum vs. Fred Archer	Slocum
34787. F. L. Owen	Annie Berman vs. D. Paliano, Appt.	A. V. Pettine
50421. E. C. S.	Central Auto. Tire Co., Appt., vs. S. M. Power	Pro se
49500. S. K. & S.	Stenman El. Valve Gdr. Co., Appt., vs. Millers, Inc.	F. H. Wildes
49785. W. J. Brown	Jonathan Watterson, Appt., vs. Jos. A. Bonin et ux.	F. & H.
56897. R. & R.	Sarah Ceovitz vs. Wasserman et al., Appt.	Semenoff
50917. R. & R.	Louis Orleck vs. Abraham Greenfield, Appt.	Gunning

SUPERIOR COURT

Elizabeth C. Grant
vs.
James S. Grant

} Div. No. 13685

RESCRIPT

October 3, 1921

BLODGETT, J. Petition for absolute divorce upon allegations of extreme cruelty and neglect to provide proper support. Marriage entered into in 1918. Petitioner was a public school teacher, resident of East Providence; respondent an electrician. Both had been intimately acquainted with one another for at least seven years prior to marriage. Proof as to neglect to provide was unsatisfactory and, in fact, this ground was abandoned by petitioner.

Evidence as to extreme cruelty consisted of certain acts by respondent, evidencing obstinacy on his part in meeting the wishes of his wife as to his behavior in the domestic circle, and as to his attire and his attitude toward the ordinary amenities of civilized life, testimony being that such attitude was more or less that of the "cave man."

There was further testimony, not denied by the respondent, that he was at times extremely sulky, and would for long periods address no conversation to his wife.

There was also testimony as to his uncleanly habits in the matter of his attire and to neglect of the use of soap and water on his person, to such an extent as to cause sickness on the part of his wife, which was in part denied by him as to the matter of baths, he testifying that he took such baths and kept the same secret from his wife. An indication of his attitude toward his wife may be gathered from his own testimony as to the night they started upon their wedding journey—a trip to Boston on the evening of the wedding day. Arriving at the South Station they walked, he carrying two suit cases, to find the location of a hotel he had known some 15 years previously. On the way the petitioner claimed to be weary and expressed a perhaps not unnatural suggestion that respondent on his wedding day might have the price of a taxi on his person. Respondent then, in front of a brilliantly lighted movie palace, slapped the suit cases upon the sidewalk, and expressed the sentiment that they might as well have it out then and there, creating more or less of a scene.

There were other incidents of happenings during a somewhat brief married experience together which need not be related, but the tendency of which is

to show that respondent altogether lacks such consideration as a husband should give to a woman of any refinement.

There was evidence of condonation on the part of the wife as to some of his alleged shortcomings, but no evidence of condonation of acts of alleged cruelty on his part after their last separation.

The court feels that the record shows such cruelty on respondent's part after a careful examination of the testimony, as to entitle the petitioner to a decree of divorce.

Petition granted.

For Petitioner: Fitzgerald & Higgins.

For Respondent: Baker, Spicer & Letts.

IRRELEVANT MATTER

* * *

(By JUDGE NOTT)

STRANGE WILLS

Portrait Filed by Legator.—Testament of Black Plague Days

(Solicitor in London Daily Mail)

All wills for which probate is granted are filed in Somerset House. They can be inspected by the public on the payment of a fee. The only exception to the above rule applies to the wills of the King and Queen of England, which are kept in the records but are sealed.

Almost every day the Principal Probate Registry Office has to deal with wills of original construction.

One of the most recent was the portrait of a pretty girl upon which the

testator had simply written, "I leave all to her." The legator, a soldier, had duly signed it, and affidavits of identity being forthcoming, the will was admitted to probate and filed in the archives of Somerset House.

A quaint will, yet these same archives contain others just as fanciful and some that are remarkable for their historical interest.

One in this collection, interesting from a medical point of view, was made by an unfortunate who died of the black plague that raged at one time in London. This will was placed in a bottle filled with spirits and then corked.

A precaution no doubt to preserve his Majesty's law officers, who would have subsequently to handle it in the course of their duties, from infection by the deadly bacilli.

Another will is in shorthand. Considering its date, somewhere round the year 1700, this is not a little remarkable, for the well-known cipher invented by the famous Mr. Pitman saw the light of day over a hundred years later.

Luckily the testator had left a key, else the authorities would have been put to no little trouble to decipher it, for shorthand was unknown in those days.

A will salvaged from the bottom of the sea supplies the nautical interest. This will was recovered after a long period of immersion, and the only damage it received was in the way of shrinkage.

It was made on parchment, and this when fished up, was found to have shrunk to about a tenth its normal size. But so beautifully had it been inscribed that the writing remains as clear as print of this day, and though very minute, it can be read easily with the naked eye.

Another quaint though cumbersome record is the leg of a four poster bed.

This bill of a certain earl was hidden in a recess at the top of this leg, and as there was a dispute over the grant of probate the leg and its large wooden castor had to be filed and kept as evidence.

Shakespeare's will with its remarkable signature, Nelson's will written in a common or garden exercise book on the eve of Trafalgar, and which toward the conclusion contains these words, "The enemy are now in sight——," a soldier's will made in a black covered note book through which a bullet has passed without making it illegible—these and many more go to make a collection that many a curio hunter would give his soul to possess.

"12 O'CLOCK CLUB"

A club of lawyers and newspaper men, which has been gaining in size lately notwithstanding the fact that no one ever has or ever will be invited to join, holds its meetings every Saturday noon about one minute of 12 in the clerk's office of the Superior Court. It is known as the "12 O'Clock Club." The attendance of one member is sufficient for a quorum.

"Charlie" Gilbert, one of the assistant clerks, gave the organization its nomenclature, and "Bob" Root, another assistant, is the official statistician for the club. Lawyers and newspaper men who rush into the clerk's office just about 12 o'clock on Saturdays to look up some records after they're all been put in the vault for the week qualify for membership then and there.

Membership in the "12 O'Clock Club" is limited and yet to belong to it is not regarded in some quarters as any particular distinction.

EVERYTHING UP IN THE AIR ON THE JUDGESHIP

Knowing that lawyers, above all others, are interested in the coming election of Superior Court judges by the General Assembly this winter, or possibly in the spring, the Rhode Island Law Record, through one of its representatives, made a survey of the situation this week and found that everything is up in the air. As far as is known there isn't a single tangible development on which to base any prediction worth while.

No one can tell at this time what the Legislature is going to do at the coming session. Party unity in the Republican organization is "shot" for the time being. There are several factions striving for supremacy.

At this writing Assistant Attorney General A. A. Capotosto is endorsed by many members of the Legislature and is regarded as a formidable candidate. Judge Hugh Baker of Newport has the backing of the Newport delegation, but has little support outside of Newport. A political trade in which the Newport delegation figured could elect Judge Baker to the Superior Court.

It is reported on reliable authority that Isaac Gill, the Pawtucket chieftain, has pledged his support to a Frenchman for the Superior Court bench and it is said that City Solicitor Elphege J. Daignault of Woonsocket is the candidate selected by the French contingent.

Whether one, two or three judges are to be elected is very problematical. In fact, everything appears to hinge on the question of whether the Republican organization is united when the General Assembly meets.

Rhode Island Law Record

ISSUED EVERY FRIDAY AFTERNOON

No Issues During Court's Summer Vacation



**A Periodical Devoted
to the Legal Profession**

October 14th, 1921

Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 3

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

AT THE EDITOR'S DESK

LAWYERS AND ADVERTISING

Lawyers as a rule are poor publicity agents. Of course it is unethical for attorneys to insert paid advertisements in the newspapers excepting in instances where they announce a new partnership or the removal of their office, but there are so many ways in which they can legitimately find their way into the public prints that it is surprising they don't take advantage of the opportunities.

Some lawyers, it is true, make it a point to let the newspapers know of a proceeding that is about to "break" and which has real news value, but the vast majority either think the court newspaper men are omnipresent or else are indifferent as to whether the case gets into the newspapers or not. Consequently many a good news story is lost entirely to the reading public or treated with scant attention by the newspaper reporters because they missed the details by not being present when the story "broke." Incidentally the lawyers in these cases have deprived themselves of some advertising they could not buy for any amount of money.

How many attorneys appreciate the value of the advertising they get by having their names printed in the court record of the daily newspapers and in connection with stories of various suits

entered in court? We venture to say that very few of them have given the matter much thought. But if the newspapers should cease publishing the names of the attorneys in all these cases it is certain the attorneys would instantly realize they had lost a tremendous benefit.

Members of the legal profession have no other legitimate way of advertising themselves than to have their names printed in connection with some litigation and they should awake to the importance of publicity of a clean and high standard. If an attorney has a case that is likely to develop an interesting question, a new point of law or an amusing situation, a word in advance to the court newspaper reporters would insure an accurate presentation of what happens. In this way the lawyer would be doing himself a service, he would be rendering a help to the newspaper men in return for the advertising he received and finally he would have the satisfaction of knowing that his thoughtfulness is responsible for the enlightenment, entertainment or amusement of the great reading public that is sure to see that item in the papers.

We are thorough believers in advertising, as it may easily be seen from this writing, for we think it is a great stimulus to any field of endeavor, and we trust that the members of the bar will become alive to the advantages that flow from unshowy advertising, both to themselves and the reading public.

Supreme Court Calendar

MONDAY, OCTOBER 17, 1921

(No Assignments)

WEDNESDAY, OCTOBER 19, 1921

Ex.5514. G. M. & H. Arnold Realty Co. vs. W. K. Toole Co.
M.P.362. J. H. A. G. Lawrence Legris vs. Israel Chernick

L. B. & McC.
C. S. S.

FRIDAY, OCTOBER 21, 1921

Ex.5510. C. J. B.-J. J. Sears vs. A. Bernardo & Sons

R. T. B.

Jury Trial Calendar

MONDAY, OCTOBER 17, 1921

50810. B. & C. P. S. Schimager vs. Louis Mogu, Appt.
49706. S. & S. City of Providence vs. Giuseppe Sarra et al.
47276. R. & R. Wolk Jewelry Co. vs. Robinson Jewelry Co.
43757. F. & M. Michael J. McCarthy vs. Rhode Island Co.
43758. F. & M. Nellie McCarthy vs. Rhode Island Co.
49888. G. E. & C. Roland E. Arter vs. M. L. Kiernan
49995. F. & H. Alice Jayne vs. Callender, McAuslan & Troup
48124. Burbank Macbeth Evans Glass Co. vs. Millers' Inc.
47614. Stiness F. N. Geave vs. Vincenzo Vicario
50082. Slocum Israel Chernick vs. Hope Publishing Co.
49615. Osterman Andrew G. Blair vs. Sarah J. McDonald
46014. Wildes Mabel Slocum vs. Frank Morelli
45044. Stiness Patent Vulcanite Roofing Co. vs. Thos H. Early Co.
50758. G. P. & T. La Corp. de St. Antone de Tilly vs. Jos. Demers
50998. R. & R. Samuel Alper p. a. vs. B. Kessler
51120. K. H. & F., Raymond R. Whipple vs. Max Latt

Huot
F. & M.
T. & L.
C. Whipple
C. Whipple
A B.. W.
P. & Sher.
F. H. Wildes
L. B. & McC.
F. & H.
M. & M.
Dorney
C. & Ball-G.
Brennan
H. E. & M.
R. & R.

TUESDAY, OCTOBER 18, 1921

50915. J. M. C. Pasqualina Gommelli vs. G. Vona, Appt.
49548. Costello William Mather vs. John Coffey
49547. Costello William Mather vs. Emma Coffey
48516. Stiness-M. Firestone Tire & Rub. Co. vs. H. J. Legace
48087. F. & H. Annie Borland, Admx. vs. Narr. Electric Lgt. Co.
49874. Bennett Helena McElroy, p. a. vs. U. S. Bottling Co.
49935. P. V. M. Charles Miller vs. Bennie Stone
50084. F. & H. Ida Evans vs. Louis W. Nadeau
50245. C. A. Walsh Frank D. Walcott vs. Frank H. Swan et als Rec.
M. P.
449. C. & Mc Fred Longbottom et' al. vs. City of Providence
44799. C. C. & Mc. Marcia Hebditch vs. William L. Duckworth
51196. S. & L. Arthur Stone vs. Charles Wagner

P. & DeP.
Zeigler-Kel.
Zeigler-Kel.
F. & H.
J. Henshaw
J. Henshaw
B. & B.
D. E. Geary
C.-Whipple

L. F. Nolan
W. & W.

WEDNESDAY, OCTOBER 19, 1921

47266. Zeigler Flossie Jordan vs. Martin F. Bentley
47267. Zeigler Fred L. Jordan vs. Martin F. Bentley
46427. Beagan Catherine A. Higgins vs. Annie T. Donnelly

Whitman
Whitman
W. & G.

45947. N. W. L.	Louisa P. Tingley, M. D. vs. Arthur D. Tingley	T. & C.
49065. Morgan	William C. Loring, Jr. vs. Maria L. Sweezy	B. S. & L.
48736. Bellin & B.	Harry Gever vs. Benjamin G. Hull	W. C. & C.
48737. Bellin & B.	Minnie Riddell vs. Benjamin G. Hull	W. C. & C.
48738. Bellin & B.	Dora Riddell vs. Benjamin G. Hull	W. C. & C.
48739. Bellin & B.	Dora Riddell vs. Thomas J. Jennings	M. H. & G.
48740. Bellin & B.	Harry Gever vs. Thomas J. Jennings	M. H. & G.
48741. Bellin & B.	Minnie Gever vs. Thomas J. Jennings	M. H. & G.
44166. Bellin & B.	Edwin R. Randall vs. Rhode Island Co.	Whipple-S.
50169. Q. & K.	Ada D. Starkey, p. a. vs. Panteles Papatheodron	P. J. Quinn
49359. C. R. Easton	Arthur Jones vs. John F. Jacobson	F. H. Wildes

THURSDAY, OCTOBER 20, 1921

48953. F. & M.	Northway Motor Co. vs. John E. Pugh	Q. & K.
49317. Dorney	Francis W. Reilly vs. Buckingham Co., Inc.	W. S. Flynn
49714. R. & R.	Nathan Greenfield vs. Peter Grammatteo	G. M. & H.
99796. R. & H.	Annie E. Reed vs. Mrs. Fred Strong	P. & DeP.
49900. F. C. S.-M.	Victoria Shoe Co. vs. Sample Shoe Co.	B. & B.
49934. Breaden	Domenico A. Mendonca vs. William J. Souther	G. H. & A.
50006. Downing	George E. Reynolds vs. Charles H. Bowers	Smith-O'R.
45748. F. & H.	Ferando King, Admr. vs. Thomas F. O'Donnell	W.C.H.-B.
46426. I' Wildes	Catarina F. Testa vs. Vincenzo Cipriano et al.	P. & DeP.
40161. F. & H.	Robert H. Moore vs. Rhode Island Co.	C. W.-W.
43101. Knauer	Patrick F. Mulvey vs. Thos. H. Early Co.	McGo. & S.
43102. Knauer	Annie T. Mulvey vs. Thos. H. Early Co.	McGo. & S.
47582. W. M. P. B.	T. F. Hunt vs. Herbert L. Richards, Admr.	C. & H.

FRIDAY, OCTOBER 21, 1921

49805. Ousley	Dewey E. Guertin vs. Mexican Petroleum Corp.	G. H. & A.
49867. Stiness	Kansas Flour Mills vs. G. B. Cutler, Jr.	H. A. Glason
49869. C. & O'C.	James Feeley vs. M. H. Rubendunst	F. & H.
49875. Ostorman	John Rose, p. a. vs. Frank Silva et al.	W. C. H. B.
49876. G. H. & A.	Mexican Petroleum Corp. vs. Dewey E. Guertin	J. Ousley
49890. G. H. & A.	Mexican Petroleum Corp. vs. Frederick J. Harrison	J. Ousley
47923. F. A. Jones	L. M. Simone vs. Dimond Restaurant Co.	T. & L.
46988. Wildes-O.	Kercock Mastrobian vs. Rhode Island Co.	Whipple-E.
50178. P. & DeP.	Albert Zannella vs. Glendale Elas. Fabric Co.	F. A. Jones
50179. P. & DeP.	Louis Zannella, p. a. vs. Glendale Elas. Fabric Co.	F. A. Jones

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, OCTOBER 17, 1921

5413. J. H. R.	Joseph A. Labelle vs. William G. Rich	W. G. R.
Eq.5384. M. & T.	Stillwater Worsted Mills vs. Jas. M. Dick et al.	L. & H.
43447. M. G. & S.	Providence Lumber Co. vs. Karen A. Haven	S. T. M.
50962. W. & G.	Clarence M. Dunbar vs. Liberty Mut. Life Ins. Co.	C. & Ball
50798. F. & H.	Rose A. Lynch, Admr. vs. Oscar's Clothes Shop	Woolley
P.324. Jacobs	S. L. Cotele vs. Woonsocket Machine & Press Co.	
50998. R. & R.	Samuel Alzser vs. B. Kessler	H. E. & M.
51393. B. & B.	Jos. T. Blumenthal vs. Roselle Milk, Inc.	A. & A.
Eq.5573. P. J. Q.	Margaret Aslanian vs. Chas. Morookian et al.	
Assgt. 169. T. P. C.	In re Assignment of Harold E. Heath	
Eq.95577. S. K. & S.	Atlantic & Pacific Tea Co. vs. Harry Fisher, et al.	
51192. Easton	Walter Brindle vs. Raymond Riley	F. & H.
Div. 13974. C. Z. A.	Bessie Levin vs. Jonathan Andrews	

47526. J. F. Collins Alfred F. Hassell vs. Benj. Lindemuth
 Eq.5559. H.E. & M. Irving A. King vs. Indiana Motor Sales Co.
 47170. W. & W. Luther S. Newell vs. Anchor Webbing Co.
 Eq.5582. Nathanson Paul H. Lussier et al. vs. Hallis N. Smith
 Eq.4395. Casey Mary J. Gilbane vs. Union Trust Co.
 Eq.5574. P. & DeP. Gabriel Scoffio vs. Vittarino Camella

W. & G.

W. & G.

G. M. & H.
S. & S.**TUESDAY, OCTOBER 18, 1921**

Eq.5512. Dorney Howard L. Barber vs. Strand Theatre Corp.
 Eq.5096. W. A. Gun. Cylinda C. Yearn vs. Frank N. Wilcox
 51191. J. H. Coen Lena A. Wasson vs. William J. Fowler
 50401. J. Rustigian Hampartoon Sakajian vs. Israel Corropian
 Eq.5271. Stiness Edward L. Stiness vs. Drew H. Henderson
 W. C. A.
 14918. J. B. Lawler Sarah Keenan vs. Sayles Finishing Co.
 J. T. W.
 49137. Coen & Co. Colonial Dress Co. vs. Cherry & Webb
 Pet.261. W. & G. Delia Packard vs. Hope Foundry Co.
 47570. E. C. Stiness Delia Stone, Admr. vs. Irons & Russell Co.
 46578. C. S. Slocum Millers, Inc. vs. Penn. Rubber Co.
 Eq.5575. Pettine Manuel Armenda vs. Manuel Medeam, et al.
 Eq.5579. B. & B. Annie Sosner vs. Max Makonsky, et al.

Bowen
W. G.

B. S. & L.

G. H. & A.
C. L. A.
R.T.B. W.&G.
E. C. S.**WEDNESDAY, OCTOBER 19, 1921**

48932. D. & D. Henry J. Dubois vs. Florence S. Marsh
 Eq. 3953. I. & K. Frank McEnaney vs. Ann McEnaney
 47489. Lavender Jacob Alpert vs. C. O. L. Thompson
 50481. Harlow, Jr. Michael Kelly vs. N. Y., N. H. & H. R. R.
 5449. Q. & K. Ethel V. Butman vs. Frank C. Butman

H. E. & M.
C. & D'C.
W. & G.
Phillips**SUPERIOR COURT**

Jennie F. Congdon
 vs.
 Louis H. Block } No. 45853

RESCRIPT

(October 11, 1921)

BLODGETT, J. Heard upon motion for a new trial after verdict of a jury for plaintiff for \$3690.

About 9:30 p. m. on November 16, 1918, plaintiff while crossing Elmwood avenue, in Providence, near Parkis avenue, which intersects Elmwood avenue, was struck by an automobile driven by defendant. Plaintiff, with her husband, was walking north on Elmwood avenue, having attended a service at the "Sunday" tabernacle. Reaching a point nearly opposite the intersection of Parkis avenue, Mr. and Mrs. Congdon attempted to cross Elmwood avenue. Just before reaching the farther side Mrs. Congdon was struck by an automobile.

Before crossing, plaintiff observed a naval reserve procession with a band pass by toward the north, Elmwood avenue at this point running in a northerly direction toward the city, and many automobiles passing in either direction. Plaintiff waited until the street was clear and stepped upon and over the car track near the curb on her side of the street, first looking up and down the track. Reaching the open street, after looking in both directions, as testified by her, plaintiff and her husband started across the street.

Her own language in answer to question by her attorney was: 4 Q. And what happened?

A. We started across. We concluded it was our chance to cross the avenue. There seemed to be nothing to check our progress and we started from the west side to cross the car track. There was no car in sight to bother us. We stepped into the street, and I glanced

down the street toward the city. There was no sign of any auto coming, so we continued across the street, across Elmwood avenue to the other side; as we came within a few—all I can tell you is that I came within a short distance of the sidewalk. That is all I know. There was nothing in front of me and nothing by my side; nothing coming. So that we could see no auto at all, nor that I could see near me or anywhere near that would be apt to interrupt the progress across, and we got within a few feet, a short distance, I would say, of the sidewalk, and that is the last I knew until I came to in the hospital.

5 Q. Well, now, Mrs. Congdon, before you stepped into the street, what did you do, if anything?

A. I glanced down toward the city to see if I was all right to go—I was on the down side.

6 Q. And did you do anything, except to glance down toward the city?

A. I walked right ahead then. I saw no auto, nothing in the way at all.

Other testimony in cross-examination on her part was that she was on the left side of her husband while crossing Elmwood avenue and that she relied upon him to aid her in getting across.

123 Q. Yes, and you relied upon him to aid you getting across?

A. Certainly.

209 Q. Now, Mrs. Congdon, will you kindly answer my question: As you stood on the curbstone with Mr. Congdon on the left hand side of Elmwood avenue, you have already told us you glanced to the left, which was down towards the centre of the city; you also looked up to your right?

A. Yes.

210 Q. At that time did you see any street cars on the opposite side of the street from where you were coming from the temple?

A. I didn't look to the other side at

all because I supposed the way was clear as we started.

Other testimony on her part in re-direct confirms her previous statements as to looking across the street in crossing the same, and not seeing the automobile which struck her.

The account given by her husband is much the same.

24 Q. What first called your attention to the fact that there was trouble?

A. Why, I was struck and knocked down. The first impression I have I was going down on the ground.

35 Q. As you got to the middle of the street, was there anything near you at your left at that time?

A. No.

72 Q. Did you see any automobiles coming upon your right as you started to cross? In other words, going toward the city, just as you started or stepped into the street?

A. Not any near.

73 Q. Well, how far were they at that time?

A. They were at least beyond the next street.

74 Q. Well, have you any idea what that would be in feet?

A. I should think 150 feet surely, or more.

Witness further testified to not seeing the automobile which struck his wife, although he looked both north and south, and that before they crossed the way was clear.

149 Q. And you and Mrs. Congdon continued from the left to the right hand side of Elmwood avenue?

A. Correct.

150 Q. Now, when you got to the centre of the street did you continue to look?

A. No. We kept right straight across.

151 Q. Then from the time you left the left hand side of Elmwood avenue

until you were almost across to the other side, neither you nor Mrs. Congdon had looked?

A. I don't know whether she did or not; I didn't.

153 Q. So that the last point of looking on your part was when you were on the sidewalk on the west side of Elmwood avenue?

A. Sure.

154 Q. And then you proceeded across the street?

A. Yes.

158 Q. Was there any reason that you didn't look as you got into the centre of the street to the south?

A. No.

159 Q. Did you attempt to look when you got to the centre of the street to see how close to you at that time this car which you say was 150 feet south at the time you were on the other side of the street was?

A. No.

161 Q. Why didn't you?

A. Well, we simply—we supposed we had time to get across the street. There was plenty of room.

166 Q. So that your idea is that there was no automobile north of Dartmouth avenue at the time that you and Mrs. Congdon were on the left hand side of Elmwood avenue, and that from that on you simply crossed the street and paid no attention to what was going on behind you; is that right?

A. Yes.

This testimony is reiterated in other parts of the record. There is no evidence that there was a crosswalk where plaintiff and her husband attempted to cross Elmwood avenue, and it appears from the record that they crossed some few feet north of Parkis avenue.

The degree of care required, as laid down in text-books and numerous cases, on part of both plaintiff and defendant, is a degree commensurate with the dan-

ger. That is, the rule must be applied in any particular case in view of the surrounding circumstances. What would be negligence at night might not be in broad day, and what might be such in a congested street might not be in an unfrequented street. The scene was Elmwood avenue, the time 9:30 p. m. A naval procession with band had just passed toward the city. As plaintiff and husband waited on the west side for a chance to cross, many automobiles passed north and south. Plaintiff evidently remembered the rule of the road that vehicles should keep to the right, as before venturing upon the car track on her side of the street she took particular pains to look down the track to her left. Plaintiff waited until the street appeared clear of automobiles, there being, as she says, none in sight, and then, having her husband upon her right, started across the street. At that time she says her eyesight and hearing were both good and her age was about 60. Plaintiff further said she relied upon the care of her husband in crossing. The accident happened after the centre of the street had been passed, just before reaching the easterly side. Neither plaintiff nor her husband knew what struck them until afterward and did not see the automobile. From time of leaving the easterly track until the accident, plaintiff and her husband testified they proceeded directly across the street and saw no automobile. Mr. Congdon says that just before leaving the track he noticed an automobile on the other side of the street about 150 feet south. The testimony of plaintiff and her husband, above quoted, satisfies the court that, after leaving the easterly track, they paid no particular attention to automobiles going in either direction, and that plaintiff relied for protection upon her husband, and that her husband relied upon the view taken when leav-

ing the easterly track for a clear way across, although he did see an automobile on the other side about 150 feet south.

It is not negligence as a matter of law to cross a street other than at a street crossing, but one in using the middle of a block of a busy street in crossing is bound to use greater care than at a regular crossing.

As to the necessity of one to keep constant lookout in crossing a busy street, the rule is most jurisdictions is that the "Stop-Look-Listen" rule as to cross tracks is not required. On the other hand, the obligation rests upon the plaintiff to use due care commensurate with the danger, and what is such due care depends upon all the surrounding circumstances. In our jurisdiction in a *nisi prius* case, the court has no power to direct a verdict where the question of contributory negligence should be left to the jury, but after verdict, upon motion for new trial it becomes the duty of the court to review the testimony as to whether plaintiff or defendant has met the burden of proof imposed, and as to whether substantial justice has been done between the parties.

In the absence of testimony of gross and criminal negligence on the part of the defendant, such negligence as would have brought about such an accident, with all due care on part of plaintiff, it is incumbent upon plaintiff to show some due care on her part under all the particular circumstances of the particular case. The evidence fails to disclose any reckless or criminal disregard by defendant of the rights of other users of the street. It has been argued that he ought to have seen the plaintiff and avoided the accident. He says he did not see the plaintiff until directly in front of his car and that then he used all means in his power to avoid

her. Defendant was on the proper side of the street and there is no evidence that he was proceeding at an improper or reckless speed. He might be criticized in that he did not produce two witnesses sitting in the rear seat of his car and offered no excuse for their absence, and this may have effected the verdict of the jury on the question of his negligence, and very properly so. If decision upon this motion rested upon the question of negligence of the defendant, the court would not feel that it could disturb the verdict of the jury. It seems established by a fair preponderance of the evidence that large numbers of automobiles were passing back and forth over Elmwood avenue, immediately before and after the accident, and that plaintiff waited for a lull in this possession before attempting to cross. The preponderance of the evidence, after careful examination of her testimony and that of her husband, satisfies the court that neither she nor her husband used such due care under all the circumstances surrounding this particular case as would entitle her to recover against the defendant.

Motion for new trial granted.

For Plaintiff: Waterman & Greenlaw and Charles E. Tilley.

For Defendant: Cooney & Cooney and Philip C. Joslin.

FEDERAL COURT DISTRICT OF RHODE ISLAND

E. Grant Hayward, Jr., }
Bankrupt } Bank. 1941

In re Petition of E. H. Silk Co.

OPINION

(October 6, 1921)

BROWN, J. The petitioner asks that the Receiver be directed to return to the Sheriff of Providence County certain property, including 33 looms, which

formerly was attached by the petitioner in its suits in the Superior Court of Rhode Island against the Queen Quality Silk Mills, Inc. The question whether the attached property belongs to the estate of the bankrupt, E. Grant Hayward, Jr., or to the Queen Quality Silk Mills, involves a consideration of the validity of a bill of sale from Queen Quality Silk Mills to Hayward, and also the validity of a mortgage from Hayward to Silberstein. It is urged that both are void as in fraud of creditors of the Queen Quality Silk Mills.

An agreed statement of facts has been filed.

By the agreed statement of facts it appears that while indebted to American Silk Spinning Co., and while under contract of purchase with the E. & H. Silk Co., the Queen Quality Silk Mills, Inc., on March 24, 1920, by E. Grant Hayward, Jr., President, executed a bill of sale to E. Grant Hayward, Jr., individually of all the goods and chattels of the corporation. On the same day Hayward executed a chattel mortgage of the property thus transferred to him to Meyer Silberstein, to secure payment of the sum of \$35,250.

The effect of the bill of sale and mortgage was to change the status of Silberstein from that of a stockholder in the Queen Quality Silk Mills to that of a secured creditor of Hayward, to the prejudice of the unsecured creditors of the corporation.

After the date of the bill of sale and mortgage, Hayward received goods delivered by the E. & H. Silk Co. in pursuance of its contract with the corporation, and accepted a draft for the price \$4503.65, with the signature, "Queen Quality Silk Mills, E. Grant Hayward, Prest."

The American Silk Spinning Co. is a judgment creditor of the Queen Qual-

ity Silk Mills, Inc., for \$9246.69, upon which execution has been returned to the Superior Court of Rhode Island wholly unsatisfied.

After the transfer and mortgage both the E. & H. Silk Co. and the American Silk Spinning Co. appear to have continued to deal with the Queen Quality Silk Mills as a corporation, without notice of, and in ignorance of, the transfer of its assets. They attack the bill of sale as invalid under Chap. 387 of the Public Laws of R. I., "Sales of Goods in Bulk Act;" and also as invalid under Sec. 1 of Chap. 253 of the General Laws of Rhode Island as to fraudulent conveyances.

Upon the agreed facts it seems clear that as against non-assenting creditors of the Queen Quality Silk Mills, Inc., both bill of sale and mortgage are invalid.

From Exhibit A it appears that of the amount \$35,250, named in the mortgage, only \$7,750 was regard as cash loaned by Silberstein to the corporation, outside his own stock interest and the stock of Hayward, which Exhibit E shows was to be collateral security to Silberstein for a loan by him to Hayward.

Assuming that advances to the amount of \$7,750 were made by Silberstein to the corporation, it appears that he has accepted from Hayward personal notes for the amount of these advances as well as for the amount of his stock interest in the corporation. It also appears that the bill of sale contains an agreement by Hayward to pay all debts of the Queen Quality Silk Mills, Inc., and assume all its liabilities. Silberstein apparently has assented to the substitution of Hayward as his debtor instead of the corporation. The petitioners have not so consented. It is their contention that they have a right to look to the property of the Queen

Quality Silk Mills for the payment of their claims.

Silberstein has elected to substitute Hayward as his debtor upon notes, including the amount of his advances to the corporation. If, after this election, he has any claim against the corporation it can only be as an unsecured creditor.

Assuming what it is questioned, that before the transfer he was a creditor of the corporation for advances to the amount of \$7,750, this furnishes no equitable ground for holding that the mortgage from Hayward is supported by a good consideration to that amount. He has no mortgage from the corporation, and no greater right to security than any unsecured creditor.

For the purposes of this petition the attachment of this property by the E. & H. Silk Mills as the property of the corporation must be held a valid attachment. Whether it is to be vacated by proceedings in bankruptcy against the Queen Quality Silk Mills cannot be determined upon this proceeding.

The attaching creditor, whose execution was returned wholly unsatisfied, resists the adjudication of the corporation as a bankrupt. The principal controversy seems to be whether the attaching creditor can secure a preference over other creditors of the Queen Quality Silk Mills.

Unless the property is of greater value than the amount of the claim of the petitioner, the estate of Hayward can derive no benefit from retaining it, except to secure compensation of the receiver. Whether the E. & H. Silk Mills is entitled to a preference over the other creditors of the Queen Quality Silk Mills is a question which must depend upon the decision upon the involuntary petition in No. 1977. If the corporation is adjudged bankrupt that will dispose of the question of prefer-

ence. Until that question is determined the property should remain in its present custody.

The petition for a return of the property to the Sheriff of Providence County is denied, without prejudice to the right to renew it after an adjudication in Bankruptcy Petition 1977.

Percy W. Gardner, Attorney for E. & H. Silk Co.

James B. Littlefield, Attorney for American Silk Spinning Co.

Joseph W. Grimes, Curran and Hart, Attorneys for Meyer Silberstein.

E. C. Stiness and D. J. Morrissey, Attorneys for Haywood.

IRRELEVANT MATTER

* * *

(By JUDGE NOTT)

"OH, LAWDY! LAWDY!"

A colored man was before Judge Hahn in the Superior Court last April charged with breaking and entering. He did not appear to be a very bad individual. It looked as though he had simply become obsessed with the idea one night that there was no harm in breaking into a shop and helping himself to what he could find.

The Attorney General's department recommended a deferred sentence. Judge Hahn gave the prisoner a little lecture on the advantages of going straight with the specific warning that if he was brought back before him by the police he would get a stiff prison sentence.

Two months later the colored man was arrested for larceny and was promptly taken to the Superior Court to be sentenced on the old indictment. It dawned on him then that Judge Hahn might not be pleased to see him again.

While being taken up from the cell-

room of the courthouse to the courtroom above by Deputy Sheriff Tillinghast the prisoner inquired if Judge Hahn was still on the bench. When the deputy informed him that Judge Hahn was still presiding in the criminal court the colored individual exclaimed:

"Oh, Lawdy, Lawdy! And he told me not to come back again."

Judge Hahn gave him three years.

A LAWYER'S SPARE

It was after Lewis A. Waterman had argued before Judge Hahn a petition for an injunction to enjoin the erection of a bowling alley on the ground that the site thereof was so near to the property of his client that the noise emanating from the alleys constituted a nuisance.

In the corridor of the court house Mr. Waterman met Thomas F. Cooney, who had heard him claim that the noise of the bowling and the bowlers constituted a nuisance.

"I heard you say," commenced Mr. Cooney, "that bowling was a nuisance and I was quite interested. I saw you bowl down at Longmeadow, Lewis, and I can say truthfully that I agree with you that bowling is a nuisance."

No one appreciated the joke any more than Mr. Waterman.

ANNOTATIONS

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Statement of the ownership, management, circulation, etc., required by the Act of Congress of August 24, 1912 of Rhode Island Law Record, published weekly except July, August and September, at Providence, R. I., for October 1, 1921.

State of Rhode Island,
County of Providence, ss.:

Before me, a notary public, in and for the State and county aforesaid, personally appeared Charles S. Cassidy, who, having been duly sworn according to law, deposes and says that he is the editor of the Rhode Island Law Record and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor and business managers are:

Name of—	Post Office Address—
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Managing Editor, None.	
Business Manager, Charles S. Cassidy,	518 Howard Bldg., Providence, R. I.

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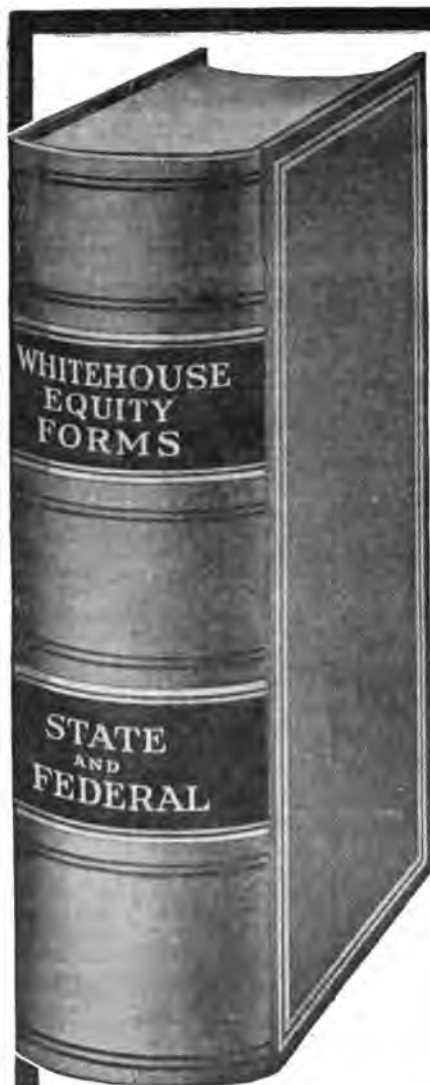
5. That the average number of copies of each issue of this publication sold or distributed through the mails or otherwise, to paid subscribers during the six months preceding the date shown above is..... (This information is required from daily publications only.)

CHARLES S. CASSIDY.

Sworn to and subscribed before me this 4th day of October, 1921.

(Seal.) Everett Appleton, Notary Public.
(My commission expires June 30, 1923.)
Form 3526.—Ed. 1916.

Note.—This statement must be made in duplicate and both copies delivered by the publisher to the postmaster, who shall send one copy to the Third Assistant Postmaster General (Division of Classification), Washington D. C., and retain the other in the file of the post office. The publisher must publish a copy of this statement in the second issue printed next after its filing.



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No. 8

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**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

AT THE EDITOR'S DESK

A PRECEDENT ESTABLISHED?

What is believed to have been a precedent in dealing with persons who interfere with the processes of the court was established last Saturday, when Judge Barrows in the Superior Court fined Samuel Gregerman and his mother for contempt as a result of their attempt to obstruct Deputy Sheriffs Paster and Bates in the serving of a process. Gregerman was fined \$100 and the mother \$25.

Habeas corpus proceedings were instituted by Mrs. Samuel Gregerman to obtain possession of her child. Judge Barrows issued an order for the production of the little girl and the Deputy Sheriffs went to the Gregerman home to get her. The woman's husband and his mother set upon the officers and tried to prevent them from taking the child to court.

James F. McCartin, attorney for Gregerman's wife, drew up a petition in behalf of the Deputy Sheriff's department to have the man and his mother adjudged in contempt. He cited authorities to support this proceeding and the

court ordered the offenders to be brought in.

The usual method of dealing with such cases is through the criminal court. Some lawyers claim the new method may also be employed in equity cases.

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It may be two years before the revised statutes are out and the Law Record suggests that lawyers cannot afford to wait that long to have their statutes brought up to date. A case in point is told of a lawyer who saved his client several hundred dollars on the strength of having had his books annotated. To be in a position where you can turn to the subject matter and find out what the last word is on the law pertaining to that question is worth a good deal more than it costs to have the work done.

The Rhode Island Law Record will be glad to furnish any lawyer who is interested with full particulars.

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63 WESTMINSTER STREET

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, NOVEMBER 21, 1921

PA778 C & O'C	G. H. Clarke et al vs Town of East Providence	A T P
Eq5320 C C & McC	J. M. Anderson vs Adolf E. Johnson et al	W H McS
Eq5321 C C & McC	J. M. Anderson vs Andrew E. Johnson et al	W H McS
Eq5322 C C & McC	Grant Pierce vs J. F. Donovan et als	W H McS
Eq5223 C C & McC	Grant Pierce vs C. Hanson et al	W H McS
51239 F & H	Thomas Quinn vs New Haven Road	E J P
51448 G E & C	Alice Roy vs John C. Glorieux	
51485 F & H	Elodia A. Banco vs Bernard Goodman	G E & C
51486 F & H	G. A. Banco vs Bernard Goodman	G E & C
Eq5610 Bowen	Sylvestre Rocchio vs F. Lombardo et al	
WCA8962 T F F	John Mazzeo vs Jos. McCormick	W C & C
50525 Stiness	Warren Ref. & Chem. Co. vs Fife's Garage	K H & F
Eq5621 F & H	Dimex Malt & Ex. Co. vs Melvin M. Merrad	
Eq5622 F & H	Dimex Malt & Ex. Co. vs Home Products Co., Inc.	
51250 E & A	Wauregan Co. vs J. C. Davis	Phillips
47526 J F Collins	A. F. Hassett vs B. F. Lindemuth	W & G
Eq5511 H E & M	Hartford Fire Ins. Co. vs Arnold C. Messler	W & G
38517 W & G	Arnold C. Messler vs Citizens Ins. Co.	H E & M

TUESDAY, NOVEMBER 22, 1921

5457 C C & McC	M. J. Medeiros vs M. D. Craveiro
5032 Bowen	Suinto Barato vs A. Simonelli
5617 Ham	P. O. Clarke vs Imp. Tenement Corp.
Eq5620 Lavender	A. D. Lauriers vs Franklin St. Garage Co.

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F H W
W R P

Supreme Court Calendar

MONDAY, NOVEMBER 21, 1921

Ex5489 B S & L May Whalen vs C. M. Dunbar et al W & G

WEDNESDAY, NOVEMBER 22, 1921

Ex5508 J B L Isabel R. Jacobs Admx. vs J. A. Gilbert J P B

GH & A

Ex5551 C & C Joseph Percelay vs Jenckes Spin. Co.

Ex5488 E C S-M Standard Mchy. Co. vs William H. Paeth F. M. O'R

FRIDAY, NOVEMBER 23, 1921

Ex5515 E C S-B Benj. T. Peck vs Bryant & Bateson M A S

Ex5490 MFC-JFM Catherine Kenney vs Br. Wm. O'Brien, I. N. F. T L C

Jury Trial Calendar

MONDAY, NOVEMBER 28, 1921

45200 F & M	James Edwards vs Wilbur D. Brown	W & W
48857 McSoley	King Braiding Machine Co. vs J. S. White Co.	W & G
50007 G H & A	G. W. Bent Company vs Austin Company	Joslin
50080 Grim	John E. Kelly vs Walter L. Clarke, C. T.	E S C-H
50155 Easton	Daniel Kitchen vs Leon Rosenfield	W H McS
50252 Joslin	Austin Co. vs. G. W. Bent Co.	GH & A
47478 P & DeP	Anthony J. Cwiek et ux vs Harold B. Andrews	R T B
46429 Beagan	Wm. J. Rooney & Sons vs Rhode Island Company	C W Eklund
50445 F & H	John W. Holland vs Clarence M. Dunbar	
50515 P & DeP	Everisto Nanni vs Samuel S. Merlo et als	Casey
51211 Gilrain	Mary Fox vs Louis S. Gervais	Hebert
44015 Casey	Max Applebaum vs Merchants Tailors Trim House	B & B
45044 E C S-M	Patent Vul. Roofing Co. vs Thos. H. Early Co.	C & B-A G

TUESDAY, NOVEMBER 29, 1921

48590 T & L	E. E. Hills et als vs T. W. Waterman Co.	H E & M
50065 Stiness-M	M. H. S. Klebenov vs Albert Silberberg Silk Corp.	P C J
50122 L B & McC	Jon. Andrews et al vs Stanislaw Yausavage et al	F H Wildes
45185 R & R	William A. Sutherland vs Margaret L. Mulholland	C & C
50275 O'S G & C	Peter E. Rakas vs Providence Gas Company	S K & S
40177 Downing	Frederick Burke vs Rhode Island Company	Williams
50353 F & H	Bertha B. O'Sullivan vs Charles Brayton	Q & K
45198 C A Walsh	Manuel Fernandes vs Antone Pelletier	Corcoran
50330 C A Walsh	Manuel Fernandez vs Felanise Pelletier et al	Corcoran
50617 Le Count	Ambrose Mendes vs Morris Marks	C S Slocum
46659 P & DeP	Donato DePalma et ux vs Fred J. Martel et al	J G Connolly
46877 Ousley	Tekla Kijik vs Frank Govern	Cooney & C
51187 Easton	Norton J. Lamson vs Pasquale Squilante	P & DeP

WEDNESDAY, NOVEMBER 30, 1921

49941 Rustigian	John Tashjian vs Paul Esaian	R & R
50160 D & D	William Rigby vs May Sheffield	F & H
50192 E A S	Butler Exchange Co. vs Fess Rotary Burner, Inc.	W & G

49297 B & B	Morris Hormonoff vs Morris Blackman	McG & S
49415 L B & McC	Isabel Peters vs Camillo G. Cambio	A Capotosto
49416 L B & McC	Edith R. Toole vs Camillo G. Cambio	A Capotosto
49806 L B & McC	Elizabeth M. Kingsbury vs Camillo G. Cambio	A Capotosto
47553 Stiness	Schlanger & Mandel vs The A. A. Spool & W. Co.	P C Cannon
50287 F & H	Camille LaPlante vs Thomas T. Wood et al	
41045 W R C-O'R	Sarah E. Kelley vs Rhode Island Company	Williams
49678 P & DeP	James Scotti vs Oakland Cemetery Co.	B S & L
46358 Cianciarulo	Giuseppe Pennochia vs Antonio Curreri et al	P & DeP

THURSDAY, DECEMBER 1, 1921

46446 McKenna	Roy S Barker vs Barker Artesian Well Co.	Cur & Hart
49884 Romano	Eucline Romano vs Antonio Di Marco	P & DeP
50123 Stin-M-B	Stand. Nut & Bolt Co. vs Danforth & King Ma. Co.	W H MCS
50196 Ballou	William H. Peters vs Herbert H. Brooks	F & H
49645 W & G	Stella J. Brooks vs Aetna Life Ins. Co.	G H & A
48334 Stiness-M	Garbed S. Ghazarian vs Rhode Island Company	Williams
49329 C A Walsh	John P. Cooney vs Moses Frank	
50775 L Jackvony	Antonio Ferri vs Nicola DiCorpo	Cianciarulo
49947 McCabe-B	Augusto Andrade vs George A. Marks et al	R & R
51245 G M & H	Lizzie H. Davis vs United Railway Sig. Co.	C & Hart

FRIDAY, DECEMBER 2, 1921

45878 Conaty	Commercial Color & Chem. Co. vs Prov. Exp. Co.	W S Flynn
50173 E C S-M	Alden Coal Mining Co. vs Geo. C. Fogarty	P C C
49055 W M P B	Everett M. Fenner, p. a. vs Charles A. Knight	Cap-Jack
49204 G-P & DeP	Abdallah Abraham vs William Nicholas	Corcoran
41125 S&S-P&DeP	Clelia Forcina vs Rhode Island Company	Whipple-S
41128 S & S	Andrea Forcina vs Rhode Island Company	Whipple-S
49919 Hennessey	Gladys I Gannon vs William Maroni et al	J H A Griffin
49920 Hennessey	Mary Elizabeth Boyce vs William Maroni et al	J H A Griffin
48351 F & H	Emma U. Allen vs Albert A. Kenyon, Exr.	W & G

SUPERIOR COURT

Alice Drowne
vs
Nicola Siravo } No. 45637

DECISION

BROWN, J. The plaintiff was a passenger in an automobile over which she had no control, driven by one Raymond Watts, who was not her servant and over whom she had no control. The machine was passing along Broad street, on the right hand side. As it approached the intersection of Corinth street, an auto truck passing from Corinth into Broad street obstructed its passage. The driver of the machine in which the plaintiff was riding turned to his left to pass the auto truck in front, and in doing so collided with the defendant's automobile which was passing along Broad street in the opposite direction. There was some conflict in the testimony as to the

exact location of the two automobiles when the collision occurred. The evidence clearly showed that the defendant's machine was on the left of the centre of the street at the time of the collision and establishes beyond controversy that the defendant was negligent in the management of the machine, and in my opinion would sustain a finding that the driver of the machine in which the plaintiff was riding at the time was also guilty of negligence which contributed to the accident, but his negligence cannot be imputed to her. She was in the exercise of due care. She received injuries as a result of the collision and is entitled to a verdict in her favor.

The verdict returned for the defendant is against the evidence. A new trial is granted.

For Plaintiff: W. A. Gunning.

For Defendant: Cooney & Cooney.

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Third Edition

By
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of the St. Louis Bar

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and
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ADDITIONAL JUDGESHIP LIKELY TO BE CREATED

Interest in the judgeship situation has increased in the last week on account of a report that efforts will be made at the coming session of the General Assembly to create an additional Berth on the Superior Court bench. If this plan goes through—and there appears to be a strong likelihood that it will—the Legislature will elect two judges, one to fill the vacancy caused by the death of Judge Doran and the other to give the Superior tribunal an added member.

It is understood that Presiding Justice Tanner of the Superior Court feels that there should be an additional judge elected and that he will recommend to the General Assembly that an extra judgeship be created at this session. It is also reported that the Governor in his annual message to the Legislature will urge the creation of an additional judgeship. So there seems to be a strong probability that before the coming session of the General Assembly is over the Superior Court will have eight judges.

Assistant Attorney General A. A. Capotosto is leading in the race to succeed Judge Doran on the Superior Court. The Republican leaders are not saying very much, but they are quietly at work and many of them express a preference for the able young prosecuting attorney.

City Solicitor E. J. Dagnault of Woonsocket, the candidate advanced by the French contingent, does not loom up so formidably now. His star seems to be fading. When his name was first men-

tioned his chances did not look unfavorable, but the sentiment that was worked up in his behalf appears not have taken root.

If it is true, as has been reported, that Justice Vincent of the Supreme Court is to resign at the coming session of the General Assembly there will be still another vacancy for the Legislature to fill. Should this come to pass a determined effort will be made, it is stated, to place John S. Murdock on the Supreme bench instead of elevating a member of the Superior Court to the State's highest judicial tribunal.

Judge Hugh B. Baker of Newport is a candidate for the Superior Court, but the sentiment for his candidacy is said to be confined to Newport County. Yet if the additional judgeship is created both Mr. Capotosto and Judge Baker may be elected.

State Law Librarian Allen will call to the attention of the Legislature at its coming session, it is reported, the danger of the State's priceless law books under the present inadequate accommodations of the law library. The building is such that should a fire break out the contents of the library, including some volumes that could not be replaced for any amount of money, would be a total loss.

It is understood that the Governor, in his annual message to the General Assembly, will urge that some provision be made to provide at once adequate accommodations for the law library.

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Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

WEDNESDAY, NOVEMBER 30, 1921

Ex5530 B & M Consolidated Dental Mfg. Co. vs David C. Flynn M & S

FRIDAY, DECEMBER 2, 1921

Ex5513 S K & S Screw Mach. Prod. Corp. vs Cutter & W. Sup. Co. M & S
Ex5499 A P Edgar Pettine vs Herman Pearson J F M

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, NOVEMBER 28, 1921

Eq5402 J B D	Emily F. Hamilton p. a. vs Robert J. Steere	
51269 R & H	Joseph A. Hogan vs Abe Abrich	J C Semonoff
47440 Breden	Excelsior Steam Eng. Co. vs J. Sinclair	
Eq5306 E & A	Sullivan Ballou vs The Amer. Wringer Co.	
Eq5479 G F Troy	G. Tartaglia vs Angelico Pezzullo	J E Dooley

TUESDAY, NOVEMBER 29, 1921

Eq5502 G E & C	Isoline N. Barnes et al vs R. Connery	W O'Donnell
48951 E L Jalbert	Wilfred Germain vs. Un. St. Jean Baptiste	Archambault
Eq5605 C & O'C	Avedis Leylegian vs H. Leylegian et al	
WCA305 E D H	Wm. Baird vs O'Bannon	R T B
47295 C & B	S. Tourtellot & Co. vs Arthur Simonelli	
50521 T & C	J. Pennington vs John D. Glover	T L Carty

WEDNESDAY, NOVEMBER 30, 1921

Eq5561 McSoley	Prov. Fur Co. vs Charles Brown	W C & C
Eq5625 Joslin	Allie Zura vs Cal. Wine Co.	
Eq5626 Joslin	Allie Zura vs Branaghan Bottling Co.	
Eq5569 Stiness	C. G. King vs Arthur I. Clark	
Eq5614 G H & A	Mary Wall vs Gorman & Co., Inc.	
51645 J F Cooney	J. H. Whitworth vs. Un Elec Ry. Co.	Whipple
50328 Joslin	Dimond Co. vs Donald McKay	H E & M

THE INTERESTS of the business man and his bank are so closely interwoven that the inquiry in his mind is "what bank had I best be allied with." To the man who is considering the question, this bank invites his attention to its strength and record. It may determine his banking connection.

National Exchange Bank

63 WESTMINSTER STREET

Jury Trial Calendar

MONDAY, DECEMBER 5, 1921

49381 A & A J	Henri Bendel, Inc. vs Matie C. Messler	W & G
50174 Stiness-M	Ansonia Forest Products vs Lyon Harootunian	
41789 Crafts-S	Ellen Gallagher vs Frank E. Bagley	W S Flynn
44592 F & H	Alexis Lessard vs Rhode Island Company	Williams
49227 Breden	John F McKiernan vs Catherine H. McKiernan, Ex.	J C Quinn
50472 P Marcus	Max Abrams vs Fannie Rubin et l	Brand
37993 L B & McC	Francesco Marsella vs Attilio Simonelli	P Romano
51216 E R Walsh	John Keyer vs Charles Pay	Breden
51212 Gilrain	James E. Fox vs Louis S. Gervais	Herbert
51373 L Semenoff	Isaac Shuhman vs Sayles Finishing Plant, Inc.	P&S F&H
51192 C R Easton	Walter Brindle vs Raymond Riley	J J Nolan, Jr.

TUESDAY, DECEMBER 6, 1921

49713 P & DeP	Gilberto Moni vs Elva Schively	W A G
49887 P & DeP	Raffaella Rongione vs Maria Rongione	AAC LVJ
50087 F & H	William Green P. A. vs William F. Bishoff	Dorney
50088 F & H	Patrick Green vs William F. Bishoff	Dorney
50089 F & H	William Green P. A. vs Lillian E. Bishoff	Dorney
50118 F & H	Patrick Green vs Lillian E. Bishoff	Dorney
50200 H A Rice	R. W. Jennings, G. T. vs U. S. Bob. & Shuttle Co.	F A Jones
43155 B & H	Louis Schwartz vs Harry Moskowitz	Joslin
49123 A & A J	Alice J. Cressy vs Rhode Island Company	Sweeney

50432 C & Canning	J. C. Tucker Co. vs William R. Champlin	O'Reilly
44983 P C Joslin	Harold Gilbert, p. a. vs Pasquale Lepore et al	P & DeP
50663 W & G	William L Lachlin vs William David	C O'Connor
50742 Joslin	Annie Hoffman vs B J Segool	L B & McC
50743 Joslin	Samuel Hoffman vs B. J. Segool	L B & McC
51160 C C & McC	Arthur Cushing et al vs Lowell C. Maxon	T & Collins

WEDNESDAY, DECEMBER 7, 1921

50159 D & D	William Rigby vs. William Hesketh	BBreaden
50175 E C Stiness	Northwestern Chem. Co. vs Millers, Inc.	F H Wildes
50273 Leighton	Arthur Corr vs Robert R. Brooks	F Hammil
47954 P & DeP	Angelo Gemma vs Giovanni Batista Ciolfi	B & V
49290 H E & M	Lillian B. Atwood vs Harry Coy	P & DeP
49865 G M & H	Spencer Kellogg & Sons, Inc. vs Prov. Churn. Co.	W S Flynn
48633 F & H	Louise Redelsperger vs Frank H. Swan et al	H Eklund
41014 W C-P O'R	James A. Dillon, Admr. vs Rhode Island Company	Williams
48192 McG & S	Beatrice O'Rourke vs Giuseppe A. Mercurio	J Henshaw
50698 W & G	Bradbury L. Barnes vs. Hardin I. Fiske	Q & McK

THURSDAY, DECEMBER 8, 1921

49513 Stiness	Farmers' Co-operative Bank vs Buckingham Co.	J P H
50259 P C J-B	Louis Stimmas vs Albert W. Rodgers, Jr.	J P H
50260 P C J-B	Harris Stimmas vs Albert W. Rodgers, Jr.	P & DeP
49649 B & B	Bay State Fur Co. vs Maggie Cavalieri	Pouliot, Jr.
50354 Vance	William Tomlinson vs Albert Marcotte	
MP491 Q & K	Wm. F. Angell vs City of Providence	
51171 McK & B	Ida Lefebvre p. a. vs Edward M. Fay	F & H
48956 E B-McC	John S. Lima vs Seneca J. Stone et als	W S Flynn
48957 E B-McC	Manuel Lima vs Seneca J. Stone et als	W S Flynn
51417 J P Beagan	Robert T. Moore vs Percy Wright	S J Casey
50787 Raymond	Horton & Gardner Corp. vs Belmont Lunch	C & O'C

FRIDAY, DECEMBER 9, 1921

50185 J W Grimes	Salvatore DiBona vs America Pennachia.	L W Dunn
46610 Stiness-M-B	Gustave Fox Co. vs F. F. Hunt Mfg. Co.	G H & A
49223 Ziegler	Alice L. Bruce vs John Jacobucci	E J Z
49524 H E & M	Jemmia MacFarlane vs N Y N H & H R R	B C
45517 P & DeP	Andrea Santangini vs Concetta Marrocco	Henshaw-L
50612 W S Flynn	George Gogoulis vs G. A. Mercurio & Co.	Henshaw-L
50613 W S Flynn	Grocers Baking Co. vs G. A. Mercurio & Co.	S & Lovejoy
50443 L B & McC	Harriet E. Dunbar vs Obadiah B. White, Adm.	J E S-O'R
50006 A Downing	Geo. E. Reynold vs Charles H. Bowen	Vance
49588 Atwood	The Art League vs Bernstein, Inc.	J Griffin
51493 McGough	Veronica Moore, p. a. vs Oakland Beach Am. As.	

District Court Appeals Calendar

MONDAY, DECEMBER 5, 1921

50015 F & Mahoney	Mary J. D'Avedisian vs Lawrence Scrivano, Appt	P & DeP
50114 W A G	Joseph R. Bingham, Appt vs J. W. Miner & Co.	A L S
50103 W A McS	Michaels-Bauer, Inc. vs William B. Gooding	F H Wildes
50314 R & R	Max Berger vs George E. Setchell, Appt	B & B
50324 E C Stiness	C. J. Fox Co., Appt vs Paul Castiglioni	McG & S
44255 McG & S	Nicola Piscilelli vs Alfred De Lucca, Appt	P & DeP
37336 Raymond	Garabed G. Melidosian, Appt vs Elias Roukos	B & B

41321 C A Walsh	Arthur R. Clark, Appt vs Edward Moore, alias	F & H
41322 C A' Walsh	Arthur R. Clark, Appt vs Samuel Moore, alias	F & H
51080 G H & A	The Morris Plan Co. of R. I. vs Peter B. Vican, alias	McG & S
51113 J C Semonoff	Morris Grossman vs Koutz Mfg. Co., Appt	N. Hilfer
49955 J B Edwards	Everett D. Higgins vs John S. Perry, Appt	R Richmond
50105 C R Easton	Daniel Kitchen vs John Broadman, Appt	McG & S
51275 F L Owen	James N. Gilson vs Michael Vito, Appt	Veneziale

TUESDAY, DECEMBER 6, 1921

47534 B & C	Alfred DelPape vs Harris Eisenberg et al., Appt	Deft. Pro Se
49110 G M & H	Joseph Conly, Appt vs Elmer M. Weiss	C Finkelstein
49108 G M & H	Clara Pomp., Appt vs Elmer M. Weiss	C. Finkelstein
50379 E C S	Rochester But. Co., Appt vs. Mer. Tail. Trim Hse	B & B
49086 P & DeP	Antonio Zelano, Appt vs David Shore	Heathman
49746 P Romano	Vincenzo DiTomasso vs Gennaro De Corpo	B & B
50560 R G E H	Nathan Sallinger vs Wm. David, Appt	C J O'C
50278 Vance	Pawtucket Clothing Co. vs K. M. Harris, Appt	T L Carty
50835 McG & S	Nathan Horowitz vs Joseph Pollock et ux., Appt	P Joslin
50881 G F Troy	Antonio Messoro, Appt vs Mary A. Fallam	McG & S
50883 Mareus	Max Abram, Appt vs Joseph B. Gomberg	T Farrell
50921 E C Stiness	Apco Mfg Co. vs Wm. H. Paine, Appt	L Semonoff
50931 F & Mahoney	C. H. Robinson, Inc. vs Benjamin W. Grossman Ap	S S Bromson
50050 Stin-M-B	United Limb & Brace Co vs Samuel Priest, Appt	I Marcus
48396 Stin-M-B	Vulcan & Reiter, Appt vs S. K. Merrill Co.	L B & McC
50868 C R Easton	Daniel Kitchen vs John Broadman, Appt	McG & S
43402 Alexander	Waterman et al vs Mistofsky et al., Appt	C & O'C

WEDNESDAY, DECEMBER 7, 1921

46696 W & W	John H. Lynch vs Wilson Potuchek, Appt	F & M
49113 G M & H	Thomas Healy, Appt vs Elmer M. Weiss	C Finkelstein
49109 G M & H	Anna Helm, Appt vs Elmer M. Weiss	C Finkelstein
49949 Burbank	Blackstone Institute vs William Albert Smith	Wm H McS
50386 R & R	Nathan W. Remmer vs L. Ciancasciole, Appt	P R
50387 E C S	Tide Water Oil Corp., Appt vs Arthur O'Dette	E R Walsh
44981 Stiness-M	The Allen Mil. School, Appt vs Maude M. Crawford	McMahon
30761 F & H	John F. McCaffrey vs Wm. Cargill, Appt	Blodgett
50866 Joslin-M	American Yarn Co. vs Giuseppe Lamargo	P Romano
50938 W C & C	Helena B. Braman, Appt vs Geo. H. Huddy, Jr., Ex.	H E & M
51075 Jackvony	Michael M. Motta vs Joseph L. Mulholland, Appt	Lindemuth
51086 Breaden	Charles S McCallum vs The Mort. & Credit Co, Ap	W J Brown
49837 Clifford	James Allocca vs John J. Handrigan et al	J Ousley
49020 Jack	Robert Hartwick vs Edward F. Cahill, Appt	C & Cooney
48067 Semonoff	N. Y. Hosiery Co. vs E. Mora	J F Collins
50922 C R Easton	Daniel Kitchen vs John Broadman, Appt	McG & S
42557 Rustigian	Abraham Dooson vs Alli Almet, Appt	R & R

THURSDAY, DECEMBER 8, 1921

46078 B & B	S. Klein & Sons vs Certain-teed Prod. Corp., Appt	Stiness-M
48610 P & DeP	Silvio Burgaglio, Appt vs Harriet C. Edmonds	Zeigler
50148 W & W	Hartley B. Bancroft vs James J. Shanahan, Appt	C S F
50019 Colton	Daniel Whitehead vs Harris Webber	Osterman
49578 Lindemuth	James Earl, Appt vs R. I. S. P. C. Children	L & McD
48874 LeCount	Joseph Pina, Appt vs R. I. Co, Receiver	Eklund-K
48079 E C Stiness	Bernard Feldman, Appt vs S. K. Merrill Co.	L B & McC
50844 E C Stiness	Geo. F. Claflin Co. vs Vincent De Rissio, Appt	P & DeP
50856 Clifford	Joseph Quartoli vs Alfred L. Lodge et al., Appt	J E Dooley
50918 W & G	James H. Parkinson vs John B. Lacuccia, Appt	Veneziale
50923 McG & S	James E. McElroy, Appt vs Balshaw	J P Conaty
51089 F & M	John D. Avedisian vs Rocco Bovino, Appt	Veneziale
51357 J O	W S Jack vs Delia Gallagher, Appt	J J S

50896 McK & B	Alice Lisabelle vs Joseph T. Dubuc, Appt	B A Huot
51273 Owen	A. C. Bornside vs John Keyes, Appt	Walsh
51274 Owen	Harry B. Bornside vs John Keyes, Appt	Walsh
51271 Owen	Armand C. Raymon vs John Gallagher et ux	Walsh

FRIDAY, DECEMBER 9, 1921

46900 W & G	C. D. Paige vs Frank H. Swan et als	Eklund
44118 Stiness-M	Piemont Winery, Appt vs Antonio Gasbarro	F & M
50018 Jackvony	A. Votta vs Antonio Ciccone, Appt	B & B
49736 Hicks	Nathan Sallinger vs Mary Tartaglione	McG & S
49731 R & R	Manhattan Wh. Gro. Co. vs Philip Mitchell, Appt	B & B
49098 Miss Sawyer	James M. Dawson vs Ferrier Land Co., Appt	Coffee & B
49736 R G E Hicks	Nathan Sallinger vs Mrs. Mary Tartaglione, Appt	McG & S
46170 Stiness-M	James G. Lyons vs E. P. Gearin & Co., Appt	C & C
42044 S & S	Carlo Delfino, Appt vs The Rhode Island Co.	Whipple-S
48861 A & A J	D. Auerbach & Sons vs Howitz Bros., Appt	R & R
49558 P & DeP	Angelo Compagnone vs James A. Vendituoli, Appt	D A Colton
51598 P Romano	Vincenzo Vicario vs Amedeo Narducci, Appt	J Venezia
49245 Finkelstein	E. G. Spooner vs A. B. Mfg. Co., Appt	Stiness-M
48972 Easton	Christopher Albanese vs John Conti, Appt	Jackvony

FEDERAL COURT

Frank L. Polk and the U. S. Trust Co. of N. Y., as Executors of the last Will and Testament of Josephine Brooks, deceased.

vs.

Equity
152

Frank A. Page, individually and as Collector of Internal Revenue for the District of R. I.

OPINION

November 17, 1921

BROWN, J. The plaintiffs seek an injunction against the defendant individually and as Collector of Internal Revenue for this District, restraining him from proceeding by distraint for the collection of an estate tax before the time fixed by Sec. 408 of the Revenue Act of February 24, 1919, 40 Stats 1057.

The plaintiffs, as executors of the will of Josephine Brooks, late of Newport, Rhode Island, who died August 17, 1920, allege that an estate of tax of \$245,-787.67 was duly assessed by the Com-

missioner of Internal Revenue, and that the period of one year and one hundred and eighty days from the death of said Josephine Brooks will not expire until the expiration of the thirteenth day of February, 1922:

The bill alleges that despite the provisions of Sections 406, 408, 1307 and 1400 of the United States Revenue Act, (Title IV, act of February 24, 1919, 40 Stats. 1057), the defendant Collector threatened immediately to distraint the assets of the estate for the payment of this tax unless plaintiffs paid the same in full to the Collector for the District of Rhode Island before the eighth day of October, 1921. They seek to enjoin the defendant from making any seizure, distress or distraint under pretense of collecting said tax or any part thereof, until the expiration of the thirteenth day of February, 1922, but no longer, and for general relief.

The plaintiffs insist that the sole right to distraint is conferred upon the Collector by Section 408:

Sec. 408. That is the tax herein imposed is not paid within 180 days after it is due, the collector shall, unless there is reasonable cause for further delay,

proceed to collect the tax under the provisions of general law, or commence appropriate proceedings in any court of the United States to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto.

It is the contention of the Collector that he is entitled to distrain under B. S. Sec. 3157, C. S. Sec. 5909: the pertinent part of which is as follows:

"If any person liable to pay any taxes neglects or refuses to pay the same within ten days after notice and demand, it shall be lawful for the collector or his deputy to collect the said taxes, with five per centum additional thereto, and interest as aforesaid, by distraint and sale, in the manner hereafter provided, of the goods, chattels, or effects, including stocks, securities and evidences of debt, of the person delinquent as aforesaid: Provided," etc.

It will be observed that under this section the collector is to proceed to collect not only the tax, but five per centum additional; further, it provides for "interest as aforesaid" at the rate of one per centum a month; R. S. secs. 3184, 3185.

The Collector contends that Sec. 408 above quoted must be read in connection with Sec. 406:

Sec. 406. That the tax shall be due one year after the decedent's death; but in any case where the Commissioner finds that payment of the tax within one year would impose undue hardship upon the estate, he may grant an extension of time for the payment of the tax, for a period not to exceed three years from

the due date. If the tax is not paid within one year and 180 days after the decedent's death, interest at the rate of 6 per centum per annum from the expiration of one year after the decedent's death shall be added as part of the tax.

The inconsistency of the provisions of R. S. Sec. 3187 and of Sec. 406 and 408 concerning interest and the amount collectible is apparent.

The Collector's contention amounts to this: that by Sec. 3187, a general provision, he is authorized to nullify the specific provisions of Sec. 406 relating to the amount to be collected, as well as the specific provision of Sec. 408 as to the time at which payment may be enforced under the provisions of general law or by suit.

He contends that Sec. 408 is applicable only after one year and 180 days, and that the provisions of general law, Sec. 3187, are applicable before. But clearly both are not applicable, since if Sec. 3187 is enforced nothing remains to be done according to the provisions of Sec. 406 and 408.

This is clearly a case where the general and special provisions of law cannot be applied so as to give effect to both, and where the special provisions render inapplicable the general provisions of law until the time fixed by Sec. 408 for enforcement.

The contention of the Collector seems to be based upon the provision of Sec. 406 of the Revenue Act: "that the tax shall be due one year after the decedent's death." It does not follow, however, that because the tax accrued or became due at this date, it was immediately enforceable by distraint. It is common in tax legislation to fix a date at which the tax accrues, a later date up to which it may be paid without interest, and a further date at which proceedings for its enforcement may be begun.

Because that statute fixes a date at which a tax becomes due, and because it is payable at any time after that date, it by no means follows that it must be immediately collectible by the process of distraint. *United States v. The State Bank of North Carolina*, 6 Peters 29, shows that the word "due" is sometimes used to express the mere statement of indebtedment, and then is an equivalent of "owe" or "owing." See also the decision of this court in *Re B. H. Gladding Co.*, 120 Fed. 809; *In Re West Norfolk Lumber Co.*, 112 Fed. 759, 767; *Wiggin v. Knights of Pythias*, 31 Fed. 122, 125.

The Collector relies also upon the provisions of Sec. 406.

"But in any case where the Commissioner finds that payment of the tax within one year would impose undue hardship upon the state, he may grant an extension of time for the payment of the tax for a period not to exceed three years from the due date."

The provision is peculiar in that the power of the Commissioner to extend the time of payment is based upon the finding of hardship in paying before the due date; but the grant of power to the Commissioner to extend the time of payment for a period not to exceed three years from the due date does not conflict with the section which imposes a statutory duty upon the Collector in the absence of any extension of time by the Commissioner under Sec. 406, as in this case. Can it be said that the provision for an extension of the time of payment by the Commissioner implies an authority of the Collector, in the absence of such extension to proceed at once under Sec. 3187, despite the specific provision of Sec. 406 that interest at six per cent. from one year after the decedent's death is to be added if the tax is not paid within one year and 180 days after the decedent's death, and of the statutory di-

rection to the Collector as a ministerial officer contained in Sec. 408:

"That if the tax herein imposed is not paid within 180 days after it is due, the Collector shall, unless there is reasonable cause for further delay, proceed to collect the tax under the provisions of general law," etc.

The plaintiffs urge that the statute, by providing a 180 days period after the due date for payment without interest, and by providing for action by the Collector after the expiration of that period, has given a substantial right to the executors of a decedent's estate in recognition of the difficulty of converting assets into cash for immediate payment of large sums for estate taxes. The time is given that loss, through immediate conversion of assets into cash, may be avoided.

The provision of the 180 days period is significant, and in view of the fact that under Sec. 208 of the Revenue Act of 1916 the period of but 60 days was provided. It would hardly be contended that this period of 60 days could be cut off by resort to Sec. 3187.

It is also significant that under the Income Tax provisions of the Act of February 24, 1919, Sec. 250 (e) expressly excepts the estates of deceased persons from the provision that if any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the Collector, there shall be added as part of the tax 5 per centum, plus interest at the rate of 1 per centum per month.

A construction of Title IV which imposes upon the estate payments from which the income of an estate relieved by the provisions of the same Revenue Act is to be avoided.

In the district of Rhode Island the difficulty of immediately converting estates of decedents into cash for payment of large estate taxes, were so serious

that legislative relief was sought and was granted by the Rhode Island Legislature, by empowering executors and administrators to raise funds by mortgaging or pledging the personal estate of decedents in their hands. Public Laws of Rhode Island, January Session 1921, Chap. 2030.

The intent of Congress to give to the estates of decedents a substantial benefit from the 180 days provision is manifest, and the judgment of Congress that a period of 180 days without interest and without distraint was proper in respect to the collection of estate taxes, cannot be questioned; nor can it be assumed from the length of this period (180 days) that it was intended that this period fixed by Congress in legislative enactment should be shortened either by regulation or by act of the Collector.

I am of the opinion that the plaintiff's contention that Secs. 406 and 408 and 1307 of the Revenue Act are exclusive of the present application of the provisions of Sec. 3187 is sound, and that the threatened distraint is without statutory authorization. If this is correct it does not matter that there are regulations which direct or pretend to authorize this, since express provisions of the Revenue Act cannot be repealed by regulation.

The Collector objects to jurisdiction, relying upon R. S. 3224:

"No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

As we have said, the validity of the tax, the obligation of the plaintiffs to pay, and the right of the United States to collect in accordance with the statute, are not contested. A restraint, however, is sought upon action not authorized by statute.

There appears to be here no element of interference with the discretion of the Commissioner of Internal Revenue in

making an assessment, and the case does not involve interference with any quasi-judicial function; it seems to be merely a question of the statutory right of the Collector,—a ministerial officer.

Sec. 3224 was brought before the court in *Dodge v. Osborn*, 240 U. S. 118, and in *Dodge v. Brady*, 240 U. S. 122. In *Dodge v. Osborn* it was said:—

" * * * it declares, by Sec. 3224, that its officers shall not be enjoined from collecting a tax claimed to have been unjustly assessed, when those officers, in the course of general jurisdiction over the subject-matter in question, have made the assignment (assessment) and claim that it is valid."

No question of that character is before us. The Collector's authority to distraint is statutory: his duty purely ministerial. The plaintiffs acknowledge the validity of the law and of the assessment, and the right of the Collector, while pursuing the provisions of the statute. Does the provision of Sec. 3224, that no court shall restrain the collection of a tax, prohibit a suit in which the plaintiff seeks to restrain a collector from proceeding prematurely and otherwise than in accordance with the statute that provides the method of collection?

This case must be distinguished from cases in which the right to collect is denied because of the asserted invalidity of the law or of the assessment. To restrain a premature enforcement, at a date earlier than that fixed by statute, protects the rights of the tax payer without impeding the execution of the law.

The system of "stringent measures, not judicial, to collect them, with appeals to specified tribunals, and suits to recover back moneys illegally exacted was a system of corrective justice intended to be complete." (*Dodge v. Osborn*, 240 U. S. 121); but it seems inapplicable when the only wrong complained of is a violation

of the statute by premature action of a ministerial officer whose power is defined by statute.

The term, "collection of a tax," implies a statutory procedure.

Does Sec. 3224 require that the executors of an estate must comply with a demand which destroys the right to 180 days for the conversion of the estate into cash

Dodge v. Osborn recognizes that there may be exceptional cases to which the provisions of Sec. 3224 are inapplicable. The circumstances of an estate tax are so unusual as to lead Congress to make a special provision; a most unusual provision of 180 days. This is Congressional recognition of the unusual situation, demanding unusual delay.

It may be said that plaintiffs seek only protection against action which is not a collection of a tax in the sense of the statute, Sec. 3224, but, on the contrary, a violation of a statute, Sec. 408. There is no legal remedy for the loss of that time which Congress thought necessary. They cannot recover if they pay the tax, in any event more than interest, and it is doubtful if they may recover that.

We may look into the statute sufficiently to determine whether the act complained of is "the collection of a tax" or a merely illegal and unauthorized act of a person without statutory authority.

If, as stated by Bouvier, p. 1569, "the writ of injunction may be regarded as the correlation of the writ of mandamus," etc., we should now observe the distinction between controlling the purely ministerial act of an officer directed by a statute, which leaves him no discretion, and the acts of officers having judicial or quasi-judicial functions to perform in the assessment of taxes.

The question of the power of a Collector to distrain before the time fixed by the statute from which his power is derived, is a judicial question. Acting

without statutory authority the distraint would be merely an unlawful seizure of property.

The loss of that substantial period of time—180 days—expressly granted by Congress for the conversion of assets, may be regarded as an irreparable injury; for which the statutes providing for recovery of taxes illegally assessed or collected afford no remedy. If the plaintiffs pay now they lose all benefit of the provision of the 180 days period, and suffer any loss from compulsory shortening of that period. As the payment, if made within 180 days after the due date is without interest, the estate will lose upwards of \$5000 by enforced payment at the earlier date, under Sec. 3187.

As the tax is payable at the due date it is doubtful if interest, in any event, could be recoverable; but assuming that such recovery is possible, there remains irreparable damage in the loss of the benefit that Congress extended to estates of decedents by fixing the time of distraint at 180 days after the due date.

The plaintiffs, in my opinion, make a case justifying the interposition of a court of equity, in order to prevent irreparable injury from an unlawful act. Furthermore, I am of the opinion that Sec. 3224 R. S. does not forbid an injunction against a ministerial officer proceeding without authority and in violation of the controlling statute, since by the term "collection of a tax" is meant a proceeding in accordance with law, and not a merely unlawful and unauthorized act.

Defendant's motions to dismiss are denied.

A draft decree for an injunction against procedure otherwise than as authorized by Sec. 408 may be presented by the plaintiffs.

For Complainant: Tillinghast & Collins.

For Respondent: U. S. Attorney Case.

SUPREME COURT

Leo Glass

vs

State Board of
Public Roads

M. P. No. 364

(Before Barrows, J., Below)

OPINION

STEARNS, J. This cause was heard on the appeal of the State Board of Public Roads from a final decree of the Superior Court, whereby the action of the State Board of Public Roads in revoking the license of Leo Glass for operating a motor vehicle upon the public highways was overruled.

Glass, who had received a license to operate a motor vehicle from the State Board of Public Roads, was notified to appear before the Board and show cause why his license should not be revoked. The specific charge was that Glass was guilty of receiving certain goods which had been stolen in this State while in transit on an interstate railroad. After a hearing the license of Glass was revoked on the ground that in the opinion of the Board he was an unfit and improper person to be licensed to operate a motor vehicle.

From the transcript of the testimony it appears that at the hearing, Glass, who was represented by counsel, entered a plea of not guilty to the charge, that several witnesses were sworn and testified, the examination being conducted by way of examination and cross-examination.

It further appears that Glass, who was engaged in the jobbing business on North Main street, in the city of Providence, bought the cotton cloth, etc., not from the thieves but from certain persons who had bought the property from the thieves. The price paid was less than the market price and this fact, in connection with the knowledge of Glass

that the vendors were engaged in the business of selling and buying poultry throughout the State, and not in handling cotton cloth, was sufficient, it was claimed, to give notice to Glass that the transaction was irregular and improper. The stolen goods were delivered to Glass by automobile belonging to the vendors. Glass testified that his suspicions were aroused, that he insisted on having a bill of sale; that payment was made by his check, on the face of which appeared a statement of the goods for which payment was made, which payment by check, by agreement, was not made until after Glass had sold the goods, that some of the goods by Glass's order were delivered directly to reputable dealers by the vendors. After the arrest of Glass he gave the authorities the names of the persons from whom he had bought the goods and as a consequence the vendors were apprehended. After their arrest and at the hearing one of the persons who had sold the goods to Glass made the statement that at the time of the sale to Glass they had told him the goods had been stolen. This was denied by Glass, who claims that the charge thus made was inspired by the desire of revenge.

At the time of the hearing the case against Glass, who had been bound over to await the action of a Federal Grand Jury, was under consideration by that Grand Jury but no report thereon had been made.

By Section 8 of the Motor Vehicle Act (Chap. 1354, Pub. Laws), it is provided that any person aggrieved by an order of the Board may appeal to the Superior Court by filing a petition and setting forth therein the grounds of appeal; that said petition shall follow the course of equity so far as applicable, and upon hearing the court "may review the evidence presented before the board and may in its discretion affirm or over-

rule or modify the order of the board." At the hearing in the Superior Court, the transcript of testimony taken before the Board was presented to that court for review, and upon consideration thereof the action of the Board in revoking the license of Glass was overruled.

The first question raised by the appeal is, was the action of the State Board warranted by the evidence in the case? By Section 7 of the act it is provided that "The board may, after a hearing of which at least days' notice in writing has been given to the licensee, for any cause it may deem sufficient, enter an order suspending or revoking the license of any person to whom a license has been issued," that the license of any person who has been convicted in any court of any violation of Section 17, which relates to the operation of motor vehicles, and Section 18, which establishes "Rules of the Road" for automobile drivers, may be revoked by the Board upon receipt by it of a certified copy of such conviction. Section 22 provides that records of all violations of the act shall be kept by the courts and a certified copy of the abstract of the record in each case shall be sent by the court within ten days of the time when such case is disposed of. The judge of any court may make such recommendation to the Board as to the suspension or revocation of the license of the defendant as he may deem necessary. In other sections, penalties of fine and imprisonment are provided for violations of the act.

It thus appears that after conviction in any court of any violation of Section 17 or Section 18, the Board may revoke a license after the receipt of a certified copy of the record of conviction without any hearing of the accused. In other cases the Board must give the licensee an opportunity to be heard before re-

voking his license. The Board however may properly in certain cases suspend a license without any hearing; for instance by Section 26 the Board is given authority, when death results from an automobile accident, to forthwith suspend the license of the operator of the car, but the license can not be revoked until after an investigation is made or a hearing is held by the Board. Throughout the statute a distinction is made between the right of suspension and of revocation. The hearing provided by the statute is judicial in its nature (Sec. 27). The Board may summon witnesses, administer oaths, order the production of books and documents, and take testimony of witnesses who are entitled to receive fees for attendance and travel. A failure of a witness to appear and testify when summoned is made a misdemeanor. As the hearing is a judicial hearing it follows that the decision of the Board must be heard on legal evidence of sufficient weight to support the specific charges made. By the terms of the act the Board may in its discretion refuse to grant a license to any applicant, whom for any reasons it considers an improper person. A broad discretion is thus given to the Board which of course must be exercised in a manner reasonable and not arbitrary. But the power to revoke a license after a hearing is more restricted. The words of the act "for any cause the board may deem sufficient" must be construed in the light of the other parts of the act. The provision for notice and hearing restricts the power of the Board to act only on the charges made. The Board revoked the license on the ground that Glass was an unfit and improper person to be licensed. The only support for this finding is that the Board found him guilty of a single offense of receiving stolen goods. In our opinion the evidence is not sufficient to support this

finding. As the proceeding in this case is civil in its nature, even though the charge is the commission of a crime, the offence may be established by the preponderance of the evidence. *Nelson vs. Pierce*, 18 R. I. 539. And it is not necessary to prove the fact beyond a reasonable doubt as in a criminal proceeding.

In weighing the testimony we have taken into consideration the fact that the members of the Board are usually laymen and not lawyers. Although in the circumstances it is perhaps too much to expect that the established rules of legal procedure should be followed with the exactness required of a court of law, yet it is only fair to the accused that there should be a substantial compliance with the fundamental rules of legal proceedings. The bulk of the testimony in this case was more hearsay testimony, which, if believed by the Board, was highly prejudicial to Glass. As this testimony was introduced by the Board it undoubtedly was relied upon by them in reaching a decision. Although there was some other evidence, yet where as in this case, improper and prejudicial testimony is found in the record it must clearly appear that after excluding such testimony there is sufficient legal testimony to satisfy the requirement of proof by a fair preponderance of testimony.

The trial justice held that the Board had power to revoke or to refuse to grant a license only in cases where the right of the public to use the highway in safety was involved; that as the licensee in this case was not accused of any offence which was accomplished by the use of the automobile or which was a result of such use, the action of the Board was unwarranted by the statutes. We do not think that the power of the Board is thus limited. The intent of the act is to secure the safety of the public in the use of the public high-

ways, and also, we think, to protect the public by preventing the use of the automobile for purposes and in ways that are injurious to the community. The use of the automobile today by the criminal class is a menace to the community. By its use the commission of crime is made easier and the apprehension of the criminal more difficult. It is conceded that if the automobile is used in the commission of crime the license of the operator may properly be revoked. But we do not think it was the intention of the Legislature to compel the Board to refrain from action until the licensee had actually made use of his automobile in the commission of crime. By Section 13, Chapter 354, Gen. Laws, it is provided that the receiver of stolen goods shall be deemed guilty of larceny. In other words, he is considered a thief and is punished as such. We think that a thief should not be permitted to operate an automobile, for as long as his character remains unchanged, the danger of his making unlawful use of the automobile is such that the privilege should be denied to him. By the act a wide discretion is given to the Board, both in the granting and the revocation of licenses. But the exercise of the discretion must be reasonable and is subject to review by the courts. Proof of the commission of any crime, regardless of its nature, however, is not in every case sufficient to disqualify a person from holding a driver's license. Many violations of law are made crimes regardless of the intent of the wrongdoer. To refuse to grant or to revoke a license because of the commission of such an offence we think would be unreasonable and unwarranted. When, however, the offence is of such a nature, or committed in such a manner, as to show a deliberate disregard of the criminal law, even although the crime is not directly connected with the operation of

an automobile, it may properly be held that the wrong-doer is not entitled to hold a license.

Without attempting in advance to establish a rule which will govern all possible cases, we think the Board is warranted in revoking or refusing to grant a license whenever in good faith and in the exercise of a reasonable discretion they find that the probable use of the automobile by the licensee would be a detriment to the public safety, welfare or morale.

Our conclusion is that if proper proof of the offence of receiving stolen goods is made the Board in its discretion may revoke the license of Glass. The proof is insufficient in this case.

The appeal of the respondent is dismissed, the decree of the Superior Court is affirmed and the cause is remanded to the Superior Court for further proceedings.

For Petitioner: Philip C. Joslin and Ira Marcus. For Respondent: Asst. Atty. General Sisson.

SUPREME COURT

Francesco Librandi
vs.
Anastasia P. O'Keefe } Ex. &c. No. 5522
(Before Brown, J., Below)

OPINION

VINCENT, J. This is an action of assumpsit and is now before us upon the exception of both the plaintiff and the defendant. On January 3, 1914, the defendant, and her husband since deceased, leased to the plaintiff a certain store located on the corner of Broadway and Knight street in the city of Providence. This lease according to its terms was to run for ten years.

The plaintiff covenanted not to sublet or assign the whole or any part of said premises without the written consent of the lessors. The plaintiff entered into possession of the premises and con-

tinued in uninterrupted enjoyment thereof until January 28, 1918, when a fire occurred.

On July 10, 1914, the plaintiff executed a mortgage on the stock and fixtures in the store to one Salvatore Chiappinelli, which mortgage was duly recorded on the same day. By the terms of this mortgage the plaintiff also covenanted and agreed that in case of any default such default would operate to terminate the mortgagor's tenancy in the premises and would constitute an assignment of the lease of the premises to the mortgagee, plaintiff further covenanted in said mortgage that he would keep insurance upon the mortgaged property payable in case of loss to the mortgagee as his interest might appear.

On March 9, 1918, the mortgagee foreclosed the mortgage. On April 16, 1918, the defendant executed a lease of the premises to one Arduine Sormanti which said lease was to run from March 9, 1918, the date of the foreclosure.

On April 16, 1918, the plaintiff brought his present action in assumpsit against the defendant. The plaintiff's declaration showed that the action was based upon a lease containing covenants and at the conclusion of the plaintiff's testimony the defendant moved for a nonsuit on the ground that the action should have been in covenant and not in assumpsit, which motion was denied by the trial court. Subsequently upon the conclusion of all the testimony, the plaintiff was permitted to file two additional counts in covenant.

The jury returned a verdict for the plaintiff in the sum of \$4700.

The defendant filed her motion for a new trial and after hearing thereon the trial court found the verdict to be clearly excessive and granted a new trial unless the plaintiff should within ten days remit all in excess of \$1160. The plain-

tiff did not file a remittitur but took an exception to the decision of the trial court which is the only exception of the plaintiff before us.

The defendant has filed twenty-two exceptions of which eighteen are to the admission and exclusion of testimony. The remaining four exceptions cover the denial of a motion to direct a verdict; the decision of the court allowing the plaintiff to file additional counts in covenant; the refusal to charge as requested; and the denial of the motion for a new trial.

The defendant contends that the trial court erred in permitting the plaintiff to file additional counts in covenant after the completion of the testimony, his writ and declaration being in *assumpsit* and the latter alleging a breach of a lease containing covenants.

It is provided by Section 26, Chapter 283, General Laws, 1909, that, "When a plaintiff has reason to doubt whether his action should be in covenant, debt, or *assumpsit*, he may bring either action and may join therein counts in covenant, debt, and *assumpsit*, or any of them, and when he has reason to doubt whether the action should be trespass or trespass on the case, he may bring either action and join therein counts in trespass and trespass on the case, or either of them, and the defendant in all such cases shall plead to the several counts according to the practice at common law, and judgment may be entered upon the counts under which the plaintiff may be entitled to recover."

There can be no doubt that under this provision of the statute the plaintiff could have joined counts in *assumpsit* and covenant in his original declaration, being in doubt which form of action he should bring, and that a judgment could properly be entered upon the counts under which it might appear he was entitled to recover. *Adams v. Lor-*

raine Mfg. Co., 29 R. I. 333; *Sowter v. Seekonk Lace Co.*, 34 R. I. 304.

The defendant argues that the sole claims of the plaintiff being upon an alleged breach of covenant for quiet enjoyment he could not be in doubt as to the proper form of action and therefore, inferentially, that the section of the statute above quoted would not apply.

In *Sowter v. Seekonk Lace Co.*, *supra*, this question has been fully covered, the court saying, "There is no provision in the statute that the doubt in the plaintiff's mind, which induces him to avail himself of the statute in question, shall be a doubt which appears to the defendant to be a reasonable one. Neither the statute nor this court in its consideration of the above cited case under the statute, have required plaintiffs to set out in pleading the nature of their doubt. Unless he shall be compelled to disclose it in his declaration, we know of no proceeding by which a plaintiff can be required to submit the nature of his doubt to the court that the court may pass upon either its existence or its reasonableness. There are not many circumstances in which the intelligent pleader would be in doubt whether his action should be covenant or *assumpsit*, though such circumstances may be conceived, and the statute contemplates that they may exist. This plaintiff by his action must be held to claim that such circumstances do in fact exist in his case; and, in the matter now under consideration, his conclusion is controlling."

The fact that the counts in covenant were added after the conclusion of the testimony does not seem to us to present any sufficient reason for excluding the plaintiff from the benefit of the statute, the purpose of which is to simplify matters of pleading and save litigants from the disadvantage arising from mistaken forms of action. Besides we think that the matter of an amendment to the

declaration is in the discretion of the trial court.

Very little need be said regarding the mortgage of the plaintiff to Chiappinelli. The validity of this mortgage is not questioned and there is no dispute as to its terms. The mortgagor being in default, the mortgage was duly foreclosed and the stock and fixtures described therein were sold at public auction, the mortgagee, Mr. Chiappinelli, being the purchaser.

About a week later Chiappelli sold the stock and fixtures purchased at the foreclosure sale to one Sormanti

On April 16, 1918, the defendant executed a lease of the store to Sormanti which said lease was to run from March 9, 1918, the date of the foreclosure under the mortgage.

The mortgage of the plaintiff to Chiappinelli contained a provision that "the said mortgagor hereby further agrees that upon default of any of the terms of the mortgage that this instrument shall operate as a transfer of any lease or tenancy that he may have in said premises at such time."

The defendant argues that the execution of the mortgage containing the foregoing provision was a breach of the lease and therefore the rights of the plaintiff, as lessee, then terminated.

On the other hand the plaintiff claims that the defendant must be charged with constructive notice of the existing mortgage and its provision and that, having accepted rent subsequent to the recording of the same she waived any default.

We do not think that the execution and recording of the mortgage is of any importance in the case, it being immaterial whether Mrs. O'Keefe had notice of it either actual or constructive. The provision in the mortgage was not, by its terms, operative until the happening of a future event. When the mortgage was foreclosed the leasehold interest of the

plaintiff was not offered for sale. Before the transfer of that interest, by virtue of the aforesaid provision, could be said to have any effect it must appear that the mortgagee by some attitude or act assumed some dominion over the premises. Whether or not the mortgagee, Chiappinelli, took possession of the store after the sale under his mortgage and thus indicated his acceptance of the provision transferring to him the leasehold estate, the testimony does not appear to clearly disclose. The privilege of the defendant to assert her right of possession through the making of a new lease to another party has been determined by this court in *Rinfret & Aruda v. Morrissey*, 69 Atl. 763.

We think that some further consideration of the question of possession, to which we have already alluded, is necessary to a proper investigation and disposition of the matter and therefore that the case should be submitted to another jury. In view of this conclusion it seems unnecessary to consider in detail the other exceptions in the case. The exception of the defendant to the ruling of the trial court denying her motion for a new trial is sustained. The other exceptions of the defendant are overruled. The exception of the plaintiff is also overruled and the case is remitted to the Superior Court with direction to give the defendant a new trial.

For Plaintiff: Cooney & Cooney.

For Defendant: Comstock & Canning.

SUPREME COURT

Bessie Levine

vs.

Solomon Levine

} M. P. No. 369

(Before Hahn, J., Below)

OPINION

VINCENT, J. The petitioner, Bessie Levine, on May 26, 1921, filed her petition in the Superior Court for Providence County for a separation from the

bed and board of her husband, Solomon Levine, and also a petition for an allowance for the support of herself and minor child and for counsel and witness fees.

On the same day the petitioner also filed a petition for a writ of Ne Exeat representing that the respondent was about to leave the State in order to evade any order or orders which the court might enter upon her petition for separation or for an allowance for her support, counsel and witness fees, and praying that said respondent should be restrained from so doing.

On the same day a writ of Ne Exeat was issued, directed to the sheriffs of our several counties or their deputies, commanding them to cause the respondent to give bail or security in the sum of \$500, that he will not go or attempt to go into parts beyond this State without leave of court and that in default of such bail or security to commit the respondent to jail.

On the following day, May 27, 1921, service of this writ was made by a deputy sheriff, who arrested the body of the respondent and accepted from him the sum of \$500 in cash as surety. On the fourth day of June, 1921, a decree was entered in the Superior Court ordering the respondent to pay to the petitioner for the support of herself and minor child the sum of \$15 per week beginning June 4, 1921, and \$10 for witness fees and \$50 for counsel fees to be paid by September 1, 1921.

The respondent having failed to comply with the terms of this decree, an execution was issued in the sum of \$300 on September 27, 1921, and placed in the hands of a deputy sheriff, commanding him to levy the same upon the goods and chattels of the respondent and for want of such goods and chattels to arrest the body of said respondent and commit him to jail.

On October 8, 1921, this execution was returned wholly unsatisfied, the officer being unable to find the respondent or any goods and chattels upon which such execution could be levied.

On September 20, 1921, the petitioner filed a petition praying for the entry of an order directing the sheriff to apply from the cash in his hands, offered and paid to him by the said respondent, so much thereof as might be needed to satisfy the arrearages for support, counsel and witness fees.

On October 20, 1921, after a hearing upon this last-named petition, a decree was entered thereon in the Superior Court (1) allowing the sheriff the sum of \$75 for the fee of counsel appearing in his behalf, (2) ordering the sheriff to pay into the registry of the court the balance amounting to \$425, and (3) permitting the petitioner to withdraw from the registry of the court the amount due her for support, counsel and witness fees.

From this decree the sheriff, Jonathan Andrews, has taken an appeal to this court says, "That said order and decree are against the law."

A sheriff is an officer of the court and subject to its orders and directions. If he desires to test the validity of any order made upon him by the Superior Court, there are well-known proceedings or remedies which he may invoke or pursue.

We think it is competent for the Superior court to order the payment of the money in question into its registry. An appeal is a creature of statute and is only available to those to whom the privilege of appeal is thereby extended.

There is no provision of our statute for an appeal in a case like the one now before us and we therefore think that it must be dismissed. In reaching this conclusion we have not considered the legality or propriety of taking what

is popularly called "cash bail" in other cases where bail is required.

Under the command in the writ of Ne Exact the officer could, in his discretion, take either bail or security. He saw fit to take a cash deposit in the amount named in the writ and we cannot see how any better security could have been obtained.

The appeal is dismissed and the case is remitted to the Superior Court for further proceedings.

For Petitioner: Charles Z. Alexander.

For Respondent: Philip V. Marcus.

SUPREME COURT

J. E. Nichols

vs

Henry W. Mason
& Co.

Ex. &c. No. 5532

(Before Doran, J., Below)

RESCRIPT

In the opinion heretofore given by us in this case the correctness of the transcript of evidence filed by the parties was established as amended, and the truth of the defendant's exceptions was established.

In accordance with the permission of this court the plaintiff has now filed a corrected statement of all of the exceptions upon which he relies. By reference to the transcripts said exceptions of the plaintiff appear to have been taken by him, and they further appear to be stated separately and clearly; their truth is hereby established.

For Plaintiff: John P. Beagan.

For Defendant: Waterman and Greenlaw.

SUPERIOR COURT

Carmine D'Errico

vs.

Emogene Ewald

No. 50210

DECISION

BROWN, J. The defendant, who is

about 70 years of age and in ill health, lives with her daughter, Jennie D. Ewald, in the City of New York. She is a widow lady, and the mother and daughter who is, and has been for 15 years, a teacher in the public schools of that city comprise the Ewald family. The defendant is the owner of real estate, with three houses thereon, situate at the corner of Pallas and Vernon streets, in the city of Providence, where she formerly lived, but has not lived there since she was 18 years of age. She has experienced some trouble at times in collecting rent from the tenants of this property, but disclaimed any desire to sell the property. She testified that she was in the office of Henry W. Cooke Co., real estate brokers in Providence, about three years ago, but failed to disclose her object in being there. The daughter testified in this regard as follows, viz:

"Mother has not been anxious to sell the property, but I have."

In July, 1920, the Cooke Company wrote to the defendant inquiring if the property was "still for sale," and requesting permission to list it for sale.

The defendant and her daughter being away from home at the time, the communication did not reach them until September. At that time by authority of the defendant, the daughter wrote the following letter, viz:—

"40 W. 127 St. N. Y. Sept. 9, 1920. H. W. Cooke Co.

Gentlemen: Your notes of July 22 and 30 just received We were out of town. My property at the corner of Pallas and Vernon Streets is still for sale. The asking price is \$15500. Have you had an offer? Trusting to hear from you, I am, Respectfully yours,

Emmogene Ewald,

Per J. D. E."

The defendant was fully aware of the contents of this letter. She testified in regard to it as follows. viz:—

A. "A year ago, in September, 1920, I received a communication from them stating that they were changing over their books and asked permission to sell my Providence real estate. My daughter asked me if I was going to answer it. I said, 'Well, I'll let them sell it for \$15,500?'"

Q. "So that in September, 1920, you wrote to Henry W. Cooke Co., telling them that they could sell your property on Pallas Street, Providence, for \$15,500 "

A. "Yes."

Q. "And from that time in September, 1920, up to February, 1921, they communicated with you, did they not, offers that they had obtained for the purchase of your Pallas Street property in Providence?"

A. "Yes."

Q. "And after you had left the property with the Henry W. Cooke Co. for sale at \$15,500 the first offer which you received from them was one for \$10,000?"

A. "Yes."

Q. "Do I understand that you would not answer that at all?"

A. "No. Nothing to answer."

The information of an offer of \$10,000 for the property was communicated to the defendant by telegram February 16, 1921, followed by a letter to the same effect February 18.

The defendant further testified in relation to this telegram as follows:—

Q. "That is, after this telegram that you say you received in February was left unanswered for some time, you then heard from the Henry W. Cooke Co. of Providence asking why you didn't answer that telegram?"

A. "Yes, that is right."

Continuing her testimony, the defendant said:

A. "I never answered that telegram." "I never paid any attention to it and never answered it because there was nothing in it to answer." "Nothing to answer because I gave them the price at the time."

Q. "At what time did you give them the price?"

A. "In September, 1920, when he sent that letter, I said, 'Well, he sent the letter. I'll give it to him to put on his books for \$15,500'."

The daughter testified in relation to the telegram as follows:

"Mother saw the telegram, offer of \$10,000. She did not answer it."

However, a letter was sent to the Cooke Co. in reply to the telegram and letter above mentioned, as follows, viz:

"40 W. 127 St., Feb. 19, 1921.

Henry W. Cooke Co., Providence, R. I.

Gentlemen: Yours of February 18 received. The property at corner of Pallas and Vernon Streets is taxed for \$11,120. We will take \$11,500 for it. Thanking you for your note and telegram, and trusting you will make the sale, I am

Respectfully yours,

Emogene Ewald,

Per J. D. E.

P. S. Hope to hear from you soon."

In relation to this last mentioned letter, the defendant disclaimed all knowledge of it, and denied authorizing her daughter to send it. She further testified in regard to this letter as follows, viz:

A. "I never offered it for \$11,500. Never offered it to anybody. Never authorized anyone to sell it for that price."

The daughter testified in relation to this letter of February 19 that she wrote it without her mother's authority or knowledge.

She further testified as follows, viz:

"My mother was never informed that the price of \$11,500 had been put on this property. I fixed the price of \$11,500 on my mother's property." "I know it was a great mistake."

In relation to the failure of the mother to answer the Cooke Co. telegram, the daughter testified as follows, viz:

A. "My mother said there was no answer."

She further testified as follows, viz:

Q. "Why did you answer it on the 19th of February if she told you that?"

A. "I was very much worried about her health and I was anxious to have the Providence property sold."

She further testified that she wrote the letter of February 18, 1921, containing the offer to sell the property at \$11,500, without the authority or knowledge of the defendant.

February 21, 1921, the Cooke Co. sent a letter to the defendant informing her of the sale of the property for \$11,500, that \$200 of the purchase price had been paid down as a binder, and that another \$200 would be paid on signing the agreement of sale, which was sent with the letter.

Although this letter and agreement of sale were delivered to the defendant February 23, 1921, and she was then made fully cognizant of the transaction, she failed to reply to the Cooke Co. until March 8, when she sent to them the following curt telegram, viz: New York, 1921, Mar. 8, P. M. 12.48.

"Henry W. Cooke Co. Hospital Trust Bldg., Providence, R. I. Mr. Bates. My house is not for sale. E. Ewald."

No word of explanation of her conduct was sent.

Upon this the plaintiff on the 21st of April sued out his writ and commenced action for breach of contract to sell the property.

At the trial no contention was made that the plaintiff had in any respect failed to do all required of him to enable him to maintain the action if a valid contract had been made for the sale of the property. The defendant contented herself with the defense that the daughter was not authorized to write that letter of February 19, 1921, and that she was not bound by that letter, because it authorized a sale of the property at less than \$15,500, i. e. at \$11,500.

The verdict was for the defendant.

The plaintiff moves for a new trial on several grounds, but seriously urges only one, viz: that the verdict is against the evidence.

The plaintiff insists that from all the evidence in the case the jury was bound to find that the daughter's act in writing the letter of February 19 was the act of the defendant, that she was bound by the terms of the letter and that the jury's finding for the defendant is clearly against the law and evidence, notwithstanding the testimony of the mother and daughter denying the authority.

In *Huffcut on Agency* (2d ed.) paragraph 100 et seq. it is said "the doctrine is that the principal is liable upon all contracts made by his agent"—"with the scope of the ostensible or apparent authority, unless the third person has notice that the agent is exceeding his authority." Paragraph 102: "This consideration leads to the conclusion that when a principal has vested his agent with apparent authority to make a certain contract and the agent acting within the scope of such apparent authority does make a contract with a person who reasonably believes the agent to possess the authority which he seems to possess the principal is bound by such contract even though the agent's authority was in fact limited in such a way that the contract was wholly unauthorized. Paragraph 103: "Where a principal has by

his voluntary act placed an agent in such a situation that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in presuming that such agent has authority to perform on behalf of his principal a particular act, such particular act having been performed the principal is estopped, as against such innocent third person, from denying the agent's authority to perform it."

"In order to establish the apparent or ostensible authority of the agent therefore it is necessary to show that the principal held out the agent under circumstances from which a reasonably prudent man might infer such authority."

"The apparent scope of an agent's authority is such authority as a reasonably prudent man, in like circumstances with X and with like means of knowledge and information would naturally infer the agent to possess."

To establish the apparent or ostensible authority of the daughter in the matter the plaintiff has shown that the defendant is a widow lady, well advanced in age, in all health, living alone with her educated daughter who by her express authority had written the letter of September 9, 1920, to Cooke & Co. authorizing a sale of the property at \$15,500. that the defendant has not lived in Providence for more than 50 years and has experienced trouble in collecting her rents to some extent; that she failed to answer the telegram of February 16, submitting an offer of \$10,000, giving as a reason that there was nothing in it to answer because she had given the price September 9 of \$15,500, whereas in that very letter she had fairly given the impression that a lesser price would be considered in the expression, viz: "The asking price is \$15,000." It is fairly to be inferred from the inquiry in the

letter of September 9 as follows, viz: "Have you had an offer?" that she was desirous of selling the property.

In all the circumstances anyone would be justified fairly in drawing the conclusion—indeed it is difficult to see how anyone could fail to draw the conclusion—that the daughter was authorized to write the letter of February 19, 1921, offering the property at \$11,500, in reply to Cooke Co.'s telegram of February 16 and letter of February 18.

The telegram and letter called for an answer, and the failure of the defendant to answer naturally led to the inference that the daughter's letter of February 19 in answer was authoritative.

In *Greene vs. Harris*, 11 R. I. 5, 17, the Supreme Court says: "Human nature constitutes a part of the evidence in every case. We more easily believe that a person has done what we should have expected under the circumstances;" and in *Fagan vs. R. I. Co.* 27 R. I. 51, 56, the Supreme Court says: "The mind requires proof to establish the less probable of the two contradictory propositions."

The defendant's conduct in the whole transaction, her refusal to answer the telegram and letter, of February 16 and 18, and especially the unsatisfactory reason given for such refusal, unerringly lead to the conclusion that the defendant after making an agreement to sell the property has changed her mind, and is attempting to escape liability on the contract by a subterfuge, and in so doing her daughter is aiding her.

The verdict of the jury is entirely unsatisfactory, fails to do justice in this case, and under the rule governing the conduct of the trial court in granting a new trial, the duty of this Court is plain.

This case ought to be passed upon by another jury. A new trial is granted.

For Plaintiff: Cooney & Cooney.

For Defendant: Charles A. Walsh.

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MOTIONS, MONDAY, DECEMBER 5, 1921

Eq. 532 Iona Specialty Co. vs May Goldschine B & B

MONDAY, DECEMBER 5, 1921

Ex.5527 J H C	Hugh McGuckian vs W. J. Powers	F H W
Ex.5525 W G R	Philip L. Herbert vs Roscoe W. Baker	H L C
Eq. 524 L B & M	H. G. Sayer et al vs. Clark Sayer & Wall, Inc.	BWG JBL SDP
Ex.5495 A & A-J B	In re John W. Rathbun	
Ex.5452 G H & A	Morris F. Conant vs Furnace Imp. Co.	M & S
Eq. 521 G E & C	Alice B. Bowden vs William T. Ide	J P B
Ex.5548 E C S	B. F. Goodrich Rubber Co. vs Millers, Inc.	F H W

WEDNESDAY, DECEMBER 7, 1921

FRIDAY, DECEMBER 9, 1921

Ex.5496 H E E	F. H. Swan et al vs Pelletier Trucking Co.	T P C
Ex.5463 G F Troy	Roger Laudati vs Vincenzo Stea et al	J V

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, DECEMBER 5, 1921

Eq.5488 N W L	Edward Shaw, 2nd vs Josephine B. Pope et al
4505 E & A-L	Cera M. Perkins vs C. H. Perkins et al
Eq.5632 S K & S	Wanskuck Co. vs Roger Wms. Fin. Co.

TUESDAY, DECEMBER 6, 1921

Eq. 5243 J B L	Anna M. Parker vs Charles S. Parker	P & DeP
47365 C & H	Mary L. Morrell vs A. J. Lalonde	H E & M
51499 M & M	Benjamin H. Burdon vs Herman Murath	S S L

WEDNESDAY, DECEMBER 7, 1921

Eq.5497 J C S	Antonio Fustado vs Frank Silva et al	E R W
50121 McSoley	H. Maxwell vs Alexander Weiner et al	H E & M
50085 McSoley	George S. Bell vs Alexander Weiner et al	H E & M
Eq.5633 Connolly	K. Meizel vs Philip Weinstein	B & B

Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 9

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Jury Trial Calendar

MONDAY, DECEMBER 12, 1921

46832 AS & APJ	The Mason Tire & Rub. Co. vs Rhody Auto Sup. Co.	W C & Curtis
50085 McSoley	George S. Bell vs Alexander Weiner et al	H E & M
50158 F & H	Andre Leyneek vs Alice Hunt	S J Casey
50201H A Rice	Richard W. Jennings, G. T. vs Penn. Textile Co.	G M & H
49546 N Littlefield	Charles Simpson vs Rhode Island Company	Sweeney
50281 Jalbert	Max Scholter vs Converse Rubber Shoe Co.	O'S G & Carr
50570 Easton	Antonio Marcaccio, Admr. vs Vito A. Marcaccio	Jackvony
51403 R & H	Thomas A. Boyle vs Edwin James, alias	

TUESDAY, DECEMBER 13, 1921

49967 AAC-LVJ	Frederico Curzio vs Luigi Martintelli	P & DeP
45879 G Sheehan	Frank C. Pettis vs Allie J. Zura	McG & S
49377 M & M	Carl G. L. Johnson vs George L. Axelson	H Eklund
49612 B & B	David Korn vs Harold B. Congdon	W Gunning
47979 H E & M	Elaine Marshall vs James Sion	F L Owen
49365 E C Stiness	Eagle Cornice Co. vs Vincenzo J. Oddo	P & DeP
50727 P C Joslin	John Sorenson, p. a. vs Edgar Hollinraka	Reddy
34422 B & Connolly	Margaret T. Driver vs Henry F. McCaffery, Exr.	J F Murphv
49379 P Romano	Gerardo Savastano vs Thomas Walczak	Cooney & C

WEDNESDAY, DECEMBER 14, 1921

48916 McCarthy	Jos. G. Gerhard vs J. G. Farnum	Remington
44004 J H Coen	Annie Brogan vs Anthony M. Cunha	Dorney
43316 R&R-W&G	City of Providence vs John F. Lennon et al	F & H-L F N
49535 G Raymond	Clara B. Crandall vs Peter J. Gunn et al	C & Canning
49399 Ziegler-K	Halchadoor Hartoollian vs George M. Rex	Barnefield
48438 A Downing	William G. Butler vs Rhode Island Company	Williams
46801 A Boudreau	Lillian F. Brackett vs Harry C. Griswold et al	W S Flynn
46802 A Boudreau	William H Brackett vs Harry C. Griswold et al	T & L
50608 Stiness-M	Standard Trunk & Bag Co. vs American Furniture	J Connolly
51032 C C & McC	Charles G. Slack vs James J. Kinney	
51161 Enos	Manuel Sousa vs Sodini & Guisti	
45081 P & DeP	Rosina Cortelessa, p. a. vs Salvatore Simonetti	J E Dooley

THURSDAY, DECEMBER 15, 1921

48254 McKenna	Emma Hoefler vs John T. Killian	C & B-B S & L
48782 McKenna	Charles M. Hoefler vs John T. Killian	B S & L
50011 R & R-A	Israel Cohen, Admr. vs Pugh Bros. Co.	

50143 Rustigian	Harry Sahagian et als vs John F. Walsh	F H Wildes
50257 C A K-Z	City of Providence vs Thomas H. Conway et al	
50258 Kelley-Z	City of Providence vs Thomas H. Conway et als	
50255 Rivelli	Annie Greco DeFusco vs Nicholas Greco	Veneziale
34763 F & H	Paul Casella vs Rhode Island Company	C W-S
49918 S J Casey	Mary C. Sweeney vs S. J. Briggs Co.	L & McD
MP492 Q & K	Ida M. Peckham vs City of Providence	
50712 C & H	Edgar McCrillis, Ex. vs Russell D. Bullock	F H H-J H
44708 C & C	Antonette Fascia vs Angelo Simone	P & DeP
50516 Conaty	Wendell J. Bourgingnon vs Jonathan Andrews et al	E C Stiness
49044 C & C	Mary Mediros vs Roland Arter	W & G
45782 Farrell	Frederic Millette vs Matthew S. Golden	R & R

FRIDAY, DECEMBER 16, 1921

50253 J W Grimes	Flora S. Maynard vs Rhode Island Company	C Whipple
47848 Stiness-M	Piel Bros., Inc. vs Samuel Ganzer	F & H
48354 F & H	Samuel Ganzer vs Piel Bros., Inc.	Stiness-M
49176 T & C	Paul C. McAbee vs Nat'l Wholesale Grocery	Cooney-C
45742 F & H	John McCabe vs Alexander Booth	T J Dorney
50826 McSoley	William H. Draper vs William Mackenize	T J Dorney
50505K H & F	Lucius M. Gardnier vs G. A. Mercurio & Co.	J Henshaw-L

SUPREME COURT

The Wauregan Co. }

vs

James C. Davis, }

Dir. Gen. of R.R. }

No. 51250

RESCRIPT

November 29, 1921

HAHN, J. Heard on demurrer to declaration.

The matter in the declaration, which is made the subject of the demurrer, is clearly surplusage and as such comes under the rule stated in 31 Cyc. 68, cited with approval in De Paolo vs Nat'l Ins. Co., Humboldt Ins. Co. 38, R. I. 126, at page 139.

"Surplusage is matter which is unnecessary either to the substance or form of the pleading, and which if stricken out, would leave a good pleading, or, as otherwise stated, which consists in the allegation of matter so wholly foreign and irrelevant that no allegation whatever upon the subject is necessary. Matter of this nature is deemed not to vitiate a pleading, and will be ordinarily disregarded, and while it may be properly stricken out on motion, it does not

render a pleading subject to demurrer, either general or special."

Demurrer overruled.

For Plaintiff: Edwards & Angell.

For Defendant: E. J. Phillips.

John Henshaw

Joseph C. Sweeney

Formerly General Solicitor of the
N. Y., N. H. & H. R. Co., and

Benjamin F. Lindemuth

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BERRY Automobiles 1921

Third Edition

By

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of the St. Louis Bar

*Editor of Automobile Law
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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 10

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Supreme Court Calendar

MONDAY, DECEMBER 12, 1921

Eq.517 B W G
Ex.5445 F H W
Ex5548 E C S

D. M. Bova et al vs A. Buonanno et al
Millers, Inc. vs R. I. Co.
B. F. Goodrich Co. vs Millers, Inc.

B C
C W- H E E
F H W

WEDNESDAY, DECEMBER 14, 1921

Eq.514 M & S

Ernest E. Bevan vs Annie F. Brooks

J C C

FRIDAY, DECEMBER 16, 1921

Ex5503 H E & M D. K. Barrett vs R. I. Co.

C W

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, DECEMBER 12, 1921

Newport S K & S
Eq.5383 M & T
Eq.5402 J B L
Eq.5511 H E & M
38517 W & G
Eq.4754 N W L
Eq.5614 G H & A
51549 G M & H
46867 M Silva
Eq.4505 E & A

Dexter Aldrich et al vs Susan H. Brownell
Stillwater Worsted Mills vs J. M. Dick et al
E. F. Hamilton, p. a. vs Robert J. Steen
Hartford Fire Ins. Co. vs Arnold C. Messler
A. C. Messler vs Citizens Ins. Co.
John M. Magoon vs. J. S. Briggs
Mary Wall vs Gorman & Co., Inc.
H. M. Steinert Co. vs Louis H. Borad
Mariano Silvi vs Clifford H. Griffith et als
Cora M Perkins vs Charles H. Perkins et al

Remington
F & H
P & DeP
W & G
H E & M
W & G
C R Easton
W A G

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TUESDAY, DECEMBER 13, 1921

51528 W G R William G. Rich vs G. Myette
50644 W G R M. E. Hynes vs Albert A. Greene
Eq.5499 J E B H. C. M. Duff Estate vs A. Bovin et al
Eq.5476 G F T G. Tartaglia vs Angelico Pezzullo et al
44795 E C S Hood Farm, Inc. vs Samuel P. Colt

J H R
M D C

J E D
W F O'D

WEDNESDAY, DECEMBER 14 1921

51034 J G LeC L. D. Alves vs Mary Olivera
5562 G F T John Quinn et al vs Joseph Drummond et al
Pet.271 W A G Luigi Lupoli vs Atlantic Tubing Co.
51418 G W B P & DeP John Perce, p. a. vs James D. Judd
51625 Slocum I. Chernich vs United Ry. Sig. Co.
51718 P & DeP G. Marsello vs. Norton Taxi Mot. Co.
51767 G Smith M. Motor Truck Co. vs Thomas Dorsey

P Romano
F L H

D E G
C & H
L B & McC
C S S

Jury Trial Calendar

MONDAY, DECEMBER 19, 1921

48418 J LeCount	Rosa Shatkin vs Annie Tversky	R & R
50124 R & R	Abraham Freedman vs Frank H. Swan et al., Rec.	C Whipple
46805 McSoley	Joseph A. Plante vs Edward Deacon	Dorney
48136 B & B	Louis Bolotero vs Wilfred T. Dorgan	C J O'Connor
48104 Wilde	Garabed G. Melidosian vs Hagop Der Toumaian	P & S
50468 Stiness-M-B	Pettingell Andrews Co., Ap. vs James J. Whalen	M F Costello
50447 C R E	Wm. Hennessey vs Slater Trust Co.	

47721 W C & C	Star Braiding Co. vs Stienen Dyeing Co., Inc.	Atwood
45786 F & H	Frank D. Hopkins vs Leo A. Bouvier	C N Wooley
45787 F & H	Nelson Hopkins vs Leo A. Bouvier	C N Wooley
51501 T & C	Ray Oil Burning System Co. vs Earl C. Wheldon, etc.	G Raymond
51636 Raymond	Royal Theatre vs Ray Oil Burning System Co.	T & C
49904 F & H	Arthur Willis, p. a. vs Isaac Saunders, et al	B & B
41573 Com & C	Butnam & Cressey Co. vs L. J. Osler	W S Flynn
49168 C R Easton	Mariano Teolis vs. Eugenio Mascatelli	P & DeP

TUESDAY, DECEMBER 20, 1921

49072 J Brennan	Wilfrid Bedard vs Sobeslyan Szczepanek	P J Quinn
46939 J H Coen	Florine E. Donahue vs Frank C. Pettis	LB&McC F&H
48436 A & A	Emile Breeze vs Kokomo Tire Co.	F H Wildes
48335 E C Stiness	Margaret T. Mulholland vs Rhode Island Co.	Williams
49029 H E & M	Harly S. Place vs H. E. Walling	J J R
48680 P & DeP	Nicola Lubrano et al vs NY., NH. & H RR.	J J R-E J P
50284 T F Vance	Eva Reinoult, p. a. vs Minnie Rosenthal	S Nathanson
48631 McG & S	Ida L. R. Reiner vs Nicholas F. Reiner	F & H
49621 Ziegler	Helen A. Bodwell vs Arthur L. Johnson	R Barnefield
50790 T L Carty	John M. Nolan vs Archer P. Goulais	W & W
49665 G H & A	Merritt & Chapman D. & W. Co. vs H. Paster, D. S.	Slocum-J
48813 A B West	Rose A. Hannigan et al vs Peter A. Currie	J Brennan
48517 E C Stiness	Redbord Gabrilove & Co. vs Crown Clothing Co.	Wildes
44166 C & C	Baglidasar Semonian vs James Panoras	G H & T
51440 F & H	John Reynlods, Jr., p. a. vs Everett E. Salisbury	G E & C
51441 F & H	John Reynolds, Jr., p. a. vs Everett E. Salisbubry	G E & C

WEDNESDAY, DECEMBER 21, 1921

43112 W S Flynn	Robert Friederich vs Charles F. W. Reinhardt	J-B L & McC
46510 P & DeP	Michele Marra et al vs Michele Colaluca	McC & S
47606 McG & S-V	Michele Colaluca vs Michele Marra et al	P & DeP
50338 R & R	Stephen S. Arnold vs Mr. Bannon	
50465 Stiness-M-B	William W. Blodgett vs Wendell Bourguignon	J F Conaty
50622 F & H	Grace A. Stearns vs Joseph Vierra	
50487 C R Easton	Concetta Cedri vs Antonio Barra	W Heathman
48736 B & B	Harry Geves vs Benjamin F. Hull	W C & Cur
48737 B & B	Minnie Riddell vs Benjamin F. Hull	W C & Cur
48738 B & B	Dora Riddell vs Benjamin F. Hull	W C & Cur
48739 B & B	Dora Riddell vs Thomas J. Jennings	M H & G
48740 B & B	Harry Geves vs Thomas J. Jennings	M H & G
48741 B & B	Minnie Geves vs Thomas J. Jennings	M H & G
49151 Q & K	Emma Freethy vs Oscar Schonhardt et al	F & H-W&W
46103 D A Colton	Antonio Disarro vs Angelo Erculano	B C
51238 A H O B-M'K	Charles H. McKenna vs Richard W. Smiley	F L Owen

THURSDAY, DECEMBER 22, 1921

50195 C R Ballou	William H. Peters vs Darius L. Goff	E & Angell
48819 J H Coen	Martha Langan vs Luigi Maiello	P & DeP
49545 B & B	William Almaido vs Clandine Oliver	J Ousley
50463 Costello	Sam Pratt vs John B. Reilly, C. T.	J G C
50464 Costello	Sarah E. Pratt vs John B. Reilly, C. T.	J G C
47559 J Smith	Giovina Pesce vs James Cianci	P & DeP
50623 F & H	Napoleon Pelletier vs Annie Guertin	Vance
45271 Alexander	Louis Pasco vs Joseph McCormick	(GP&T-TM&H
45272 Alexander	Albert Pasco, p. a. vs Joseph McCormick	P & S
49778 C & DeS	Michele Marcotrigiano vs John Keyes	E R Walsh

FRIDAY, DECEMBER 23, 1921

(No Assignments)

SUPREME COURT

Dr. Fred A. Coughlin

vs

Rhode Island Co.

Ex. &c. No. 5478

OPINION

December 2, 1921)

(Before Brown, J., Below)

STEARNS, J. This is an action of trespass on the case for negligence, to recover for injuries to plaintiff caused by collision between an automobile in which plaintiff was riding and a trolley car of defendant company. After a trial by jury, which resulted in a verdict for plaintiff, and the denial by the trial justice of defendant's motion for a new trial, the case is now in this court on defendant's bill of exceptions.

The accident occurred in the evening of November 4, 1919, on Westminster street near the junction of Empire street in the city of Providence. Plaintiff was invited to ride to his home by a friend. John H. McGough, in a small enclosed automobile, which was owned and driven by Mr. McGough. The automobile was driven south on Empire street, which is a wide street, running north and south, to the junction of Westminster street, which latter street runs east and west. At the junction of the two streets McGough turned into Westminster street intending to proceed on that street in an easterly direction and shortly thereafter the automobile came into collision with a trolley car which was running westward on Westminster street. McGough testified that he saw the trolley car two hundred fifty to three hundred feet distant as he turned into Westminster street; it was raining and the street and car rails were slippery; the left-hand wheels of his automobile were caught in the trolley track in such manner that he was unable to get clear of

the track; the street was well lighted and there was no other vehicle or any obstruction between the automobile and the trolley car; he was travelling slowly, but the trolley car was driven at an excessive and high rate of speed, which he alleges was negligent and the cause of the accident.

The motorman, an employee of the defendant, testified that the automobile turned onto the track from Empire street; the power was shut off his trolley car at the time, that he did all that he could to stop the trolley car, which travelled only about ten feet from the time he first saw the automobile to the place of the collision and that his trolley car was practically at a standstill when it was struck by the automobile. One witness testified that the trolley car was running about twenty miles an hour and that its speed was but slightly reduced at the time of the collision. All the witnesses agree that there was a loud crash caused by the collision and that the left side of the automobile was wedged in under the bumper of the trolley car so firmly that it was found to be necessary to jack up the trolley car in order to extricate the automobile. The force of the collision was considerable and the conclusion from the uncontradicted evidence is reasonable that one or both of the colliding cars was moving with considerable speed at the time of the collision.

By ordinance of the city of Providence it is provided that trolley cars shall not be propelled faster than six miles an hour on this part of Westminster street. Defendant objected and took an exception to the introduction of this evidence by plaintiff.

The plaintiff was a passenger and a guest of Mr. McGough's car and had nothing to do with the operation or control of the automobile. He sat on the

right hand of the driver as the automobile turned into Westminster street. He testified that he was not paying any particular attention to the driving of the automobile, was not on the lookout for trolley cars and that he first saw this trolley car when it was about four lengths of the automobile or about thirty-five feet distant from the automobile and that he did not know exactly the rate of speed the trolley car was running at that time.

At the conclusion of the testimony defendant moved the trial court to direct a verdict in its favor on that ground that plaintiff was guilty of contributory negligence as a matter of law. This motion was denied. The action of the court was correct. Taking a view of the evidence most favorable to the defendant, the utmost defendant can properly claim is that the question was one of fact to be left to the jury. The issue was submitted to the jury with suitable instructions by the trial justice.

If McGough's version was substantially correct, the failure of plaintiff to look before turning the corner was immaterial. McGough saw the car in ample time and was trying to get off the trolley track, but was prevented from doing so by the skidding of his car. On defendant's theory of the case it is difficult to see how plaintiff, the passenger, can be said to have had any reasonable opportunity or time to have communicated with McGough before the collision occurred.

It is conceded by defendant that the negligence of the driver of the automobile is not to be imputed to a guest in the automobile and that generally the question of contributory negligence of such a guest is a question for the jury. *Hermann vs. R. I. C.*, 36 R. I. 447. The claim is made in this case that it was the duty of the passenger as a matter

of law to look for the approach of a car, as the street corner was a place of danger. There was nothing unusual in the conditions at the junction of the two streets, and no other danger than such as usually is found at the intersection of many city streets. The duty of the passenger to look is one which is dependent on the circumstances. The driver of the automobile is bound to keep a practically continuous outlook while driving, but no such duty is imposed on the passenger. In the absence of knowledge of danger or of facts, which should give him such knowledge, a passenger or guest may properly rely on the driver to attend to the driving of the automobile. The primary duty of care for the safe operation rests upon the driver. The passenger, however, is not relieved from the exercise of all care for his own protection, but the amount of care required of a passenger necessarily varies with the circumstances of each case. We find nothing erroneous in the comments of the court on the facts or in the statement of the law applicable thereto. The issues were properly submitted to the jury.

Defendant requested the trial court to charge, as follows: "If the jury find that when the automobile reached the car track and was proceeding toward the electric car, the electric car was not going faster than six miles per hour, the plaintiff can not recover." This request was refused and exception to this ruling is now pressed. Defendant's claim is that if a trolley car is proceeding at a rate of speed within that allowed by the city ordinance it can not in any case be held to be travelling at an excessive rate of speed. In *Oates vs. Union R. I. Co.*, 27 R. I. 499, it was held that violation of a statute or municipal ordinance limiting the rate of speed or the management of street railways as a matter of law but that evidence of

did not necessarily amount to negligence such violation was relevant and prima facie evidence upon the question of defendant's negligence. At p. 503 the court says: "The office of such ordinances in civil cases is to be used by the jury as aids in determining the question of negligence. The province of the jury is not to determine that a given act is negligent because it is a violation of an ordinance or regulation, but to declare such an act to be negligent because it is not marked by the degree of care which the circumstances impose. The ordinance is one of the circumstances only which they are to take into account." In the case at bar evidence that the rate of speed was not in excess of six miles an hour, the limit allowed by the ordinance, is not conclusive proof of the exercise of due care by defendant but is simply evidence bearing upon the question of defendant's care and is to be considered by the jury in connection with the attending circumstances in the decision of this issue. The question whether the speed is improper or excessive is to be determined not by the limits fixed by statute or ordinance but upon consideration of the reasonableness of the rate of speed in the circumstances. To move a trolley car at all in some cases might be improper and negligent and consequently the rate of speed might then properly be held to be excessive. This exception is overruled. The damages are not excessive.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: Cooney & Cooney.

For Defendant: Clifford Whipple and Earl A. Sweeney.

SUPREME COURT

Penn. Rubber Co. }
vs } Ex. &c. No. 5498
Millers, Inc. }

RESCRIPT

December 7, 1921

(Before Blodgett, J., Below)

This is an action of assumpsit brought by the Pennsylvania Rubber Company, a corporation created under the laws of the State of Pennsylvania, against the Millers, Incorporated, a corporation created under the laws of the State of Rhode Island, to recover a balance due on book account for certain merchandise consisting of tires, tubes, etc. The transactions relating to the purchase and delivery of these goods were carried on with the "Broadway Tire Exchange Incorporated," which at the time of the commencement of this action had changed its corporate name to Millers, Incorporated.

It is not disputed that the defendant corporation is liable for all the indebtedness of the Broadway Tire Exchange, there having been a change of name only.

The case was tried before a justice of the Superior Court sitting with a jury and a verdict was rendered for the plaintiff in the sum of \$10,220.85.

The defendant's motion for a new trial was heard and denied.

The case is now before us upon defendant's bill of exceptions. There are fifteen exceptions to the admission and exclusion of evidence and an exception to the refusal of the trial court to grant the defendant a new trial.

The testimony shows that the plaintiff was a manufacturer of automobile tires and tubes with its factory at Jeanette, Pennsylvania, and a branch office at Boston, Massachusetts. The Broadway Tire Exchange, Inc., with offices at Providence, Rhode Island, sold automobile tires and tubes to the trade.

On May 13, 1918, and again on February 19, 1919, the Pennsylvania Rubber Company and the Broadway Tire Exchange entered into written agreements, known as distributors agreements.

The agreement dated February 19, 1919, is the one covering the sale of goods for which this suit is brought. By this agreement the Pennsylvania Rubber Company agreed to give the Broadway Tire Exchange certain terms and discounts and the Broadway Tire Exchange agreed to sell certain automobile tires and tubes and to pay for the same on the tenth day of the month following the date of invoice.

Under this agreement the parties proceeded to do business and the Pennsylvania Rubber Company shipped a large quantity of goods to the Broadway Tire Exchange, Inc.

This agreement expired by limitation on September 30, 1919, and although no new agreement was made the Broadway Tire Exchange ordered and received a few shipments of tires and tubes after that date.

The book account on which the plaintiff sues in this action covers the period from April 26, 1919, to December 17, 1919, and includes one hundred and six items of charges, each item covering a separate order and shipment, and eighty-one items of credits. The balance claimed to be due from the Broadway Tire Exchange, covering items shipped as shown on this account, is \$9,809.75 and interest.

The defendant contends (1) that the plaintiff has failed to prove its account by proper evidence; (2) that there was no sufficient proof that the goods were delivered, and (3) that there was no competent testimony that proper credits had been given.

Invoices of the goods were made from time to time preceding shipments. These

invoices were made in duplicate. One copy of each was sent to the defendant and the other copy pasted in a book kept by the plaintiff. From these invoices thus preserved a ledger account was made up. Copies of these invoices and the sheets of the ledger were produced at the trial and were identified by one or more witnesses.

It appeared in evidence that all the goods listed in the invoices were shipped to the defendant. that the latter had, in each instance, receipted for the same; and that such receipts were present in court and open to the examination of the defendant.

There is testimony on the part of the plaintiff that all proper credits have been given to the defendant.

The tires which were purchased by the defendant from the plaintiff were guaranteed by the latter to given a certain service in miles and upon their failure to come up to the terms of the guaranty, provided such failure was due to some defect in the tire and not to its abuse, the purchaser became entitled to a new tire by paying therefor the price thereof less the amount represented by the time the original tire had served. For instance, if the guaranty was six thousand miles and the price was thirty dollars and the tire had covered only three thousand miles, the purchaser could claim a new tire by surrendering the old one and paying fifteen dollars in cash, unless some considerations entered in to decrease the allowance or to release the plaintiff altogether from any liability in that respect.

The amount of the allowance was agreed upon, in the first instance, by the defendant and its customer and later submitted to the plaintiff for final determination in accordance with the terms of the contract between them.

From time to time the defendant made allowances to its customers which were

deemed to be excessive and unwarranted by the plaintiff and were accordingly reduced.

In a course of dealing extending over a considerable period, these reductions amounted in the aggregate to a substantial sum which the defendant claims should be credited to it. We do not think that such a claim is justified. It is admitted that the final decision as to the amount of the allowance to be made in each case rested with the plaintiff. Neither the president and treasurer nor the general manager of the defendant appears to be able to show that the plaintiff has failed to credit any allowance arrived at in the manner prescribed by the agreement.

We think that there is ample testimony to sustain the verdict and we can see no reason for disturbing it.

The defendant's exceptions are all overruled and the case is remitted to the Superior Court for the entry of judgment on the verdict.

For Plaintiff: E. C. Stiness, Daniel Morrissey, Christopher Brennan.

For Defendant: Frank H. Wildes.

SUPREME COURT

Catherine Kenney, Admx.,	}	Ex. &c. No. 5490
vs		
Branch Wm. O'Brien,		
No. 214, I. N. F.		

RESRIPT

December 2, 1921.

(Before Sumner, J., Below)

This is an action of assumpsit brought by Catherine Kenney, administratrix of the estate of Timothy Kenney, deceased, against the defendant, an incorporated fraternal organization, to recover certain sums of insurance money alleged to be payable to the plaintiff by the defendant upon the death of said Timothy Kenney.

The declaration alleges that Timothy

Kenney at the time of his decease was a member in good standing of defendant corporation and that according to the rules of said defendant corporation the plaintiff, the widow and administratrix, became entitled to the sum of three hundred dollars to be paid by said defendant, and that the defendant though requested has refused to pay plaintiff said sum or any part thereof.

At the conclusion of the testimony, upon motion of the defendant, the trial justice directed the jury to return a verdict for the defendant. The case is now in this court on bill of exceptions of the plaintiff.

Some five exceptions were taken at the trial, three of which are not now pressed before this court. The fifth exception is unimportant and requires no special mention. The remaining exception is to the decision of the justice in directing a verdict for the defendant. The facts in the case are not in dispute. Two questions of law are raised by this exception: (1) Is defendant a proper party defendant? (2) Was Timothy Kenney at the time of his decease a beneficial member of the defendant organization?

The defendant corporation is a subsidiary branch of a fraternal organization known as The Irish National Foresters Benefit Society; with a number of other similar branches, it forms a part of an incorporated society known as Rhode Island District, No. 10; the branch and district organizations are connected with another corporation, the United States Subsidiary Council, No. 4, which latter corporation with the other corporations are all parts of and connected with the parent organization, known as The National Foresters Benefit Society. The defendant corporation was organized and subject to the control of the constitutions and by-laws of the general and the district associations.

The defendant had the right to make such by-laws for its own government as were suitable and not inconsistent with the by-laws of the other organizations. Payments on account of entrance fees, subscriptions, fines, etc., were made to the branch. One of the objects of the general organization was the provision for an insurance on the lives of the members and provision for a fund for this purpose was made by fixed payments to be made by the branches to the general organization from entrance fees and per capita taxes on said members. By Article XX, Section 2, of the Constitution of District, No. 10, it is provided that on the death of a member in good standing one hundred dollars shall be paid to those who are entitled to receive it. By Sec. 3, it is provided that when any branch presents a death claim for payment the branch secretary must produce the necessary proof and the branch books at the office of the district secretary for examination by the District Claim Committee and if the claim is approved, the district treasurer shall pay the amount claimed to the nominee entitled to receive it. Under the Constitution of The Irish National Foresters Benefit Society, United States Subsidiary Council, No. 4, by Article XIV, Section 4, the amount of insurance to be paid is specified and by Article XVI, Section 5, it is provided as follows: "Upon the receipt of a claim the subsidiary General Secretary shall submit the same Subsidiary Executive Council (S. E. C.) and if they approve the claim the amount shall at once be forwarded by the Subsidiary General Treasurer (S. G. T.) to the Branch Secretary (B. S.) in bank draft payable to the person entitled to receive it and if claim is not approved the Subsidiary General Secretary shall return to the Branch Sec. the Due Book belonging to said claim."

Timothy Kenney has been a member

of defendant organization for a number of years. At the time of his death, on January 7, 1917, his dues had been paid up to the first of January. During the preceding year at one time he had been in arrears in the payment of his dues, and the defendant claims that in consequence thereof under the rules of the organization his estate was not entitled to the payment of the death benefits at the time of his decease. In the view we take of the case it is not necessary to decide this question at this time, and as the same question may arise in other proceedings we do not deem it proper to decide the question without first hearing arguments on the same by the party or parties who may be liable to pay the claims.

We are of opinion that there was no error in the action of the trial court in the direction of a verdict on the ground that the defendant was not liable to the plaintiff and was not a proper party defendant in this case. The plaintiff's claim to insurance by reason of the membership of the deceased in the defendant branch was subject to the rules of the above mentioned organization and her claim to payment rests upon the contract established by such rules. The defendant had no right or authority to pay any death claim directly. The defendant's duty was simply to present properly the plaintiff's claim to the proper committees of the district and the council by whose order, if the claims were approved, payments of insurance were made directly to the beneficiary and not to the branch. It is not disputed that the defendant branch had submitted the claim in this case to the proper committees. Having done this, so far as appears it has discharged its duty to the plaintiff and is under no obligation and has no authority to make payments on this claim. The claim, if valid, is against some of the above men-

tioned corporations and not against defendant.

All of the exceptions of the plaintiff are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: M. F. Costello and James M. Murphy.

For Defendant: Thomas L. Carty.

SUPREME COURT

George D. Gladding, Ex.

vs

Edward Atchison, et al.

Ex. &c.

No. 5502

OPINION

December 7, 1921

(Before Brown, J., below)

STEARNS, J. This is an action in assumpsit with the common counts brought by plaintiff, the executor of the Estate of Ardelia C. Dewing, as trustee, for the use of Brayton A. Round et al, trustees in bankruptcy of the M. Dewing Co., a Connecticut corporation, to recover the surplus proceeds from the sale of certain oyster leases owned by Ardelia C. Dewing.

The sale was made by defendants under the provisions of Section 26, Chapter 203, Gen. Laws, and the proceeds thereof were received by the defendants who at the time were the Shellfish Commissioners of the State of Rhode Island. The action was brought against the defendants as individuals. In addition to the general issue defendants filed several special pleas alleging, among other claims, that as such commissioners they were the agents of the State, that the money sued for was owing and belonged to the State and was received by defendants in their capacity as agents of the State acting in the name and under the authority of the State; that all of said money before action was begun had been paid over to the General Treasurer of

the State. Plaintiff demurred to the special pleas and the demurrers were sustained. It was held that the action was not one against the State, and that plaintiff was entitled to sue the defendants to recover for their failure to pay over to him the surplus proceeds as required by statute. No exception to this decision was taken by the defendants. On motion made defendants were then permitted to file a plea in set-off, in which they alleged that plaintiff was indebted to defendants in their capacity as commissioners of shell fisheries of the State, acting for and in behalf of said State in the sum of \$4,796.88 by book account due and owing for rental under certain leases of oyster grounds, for interest and certain other charges and expenses incident to the sale of said leases, as follows: "account A on leases No. 594, 586, 687 issued to Ardelia C. Dewing \$639.44". "account B on leases Nos. 883, 884, 939, 940, 942 not under seal, issued in the name of George D. Gladding, the said George D. Gladding being then and there the agent for an undisclosed principal, namely, the agent of Ardelia C. Dewing." Then follows an itemized statement of rentals due on said leases from 1913 to 1916 inclusive, with interest and other charges, the total being \$4,796.88, which defendant averred was due and owing from plaintiff to defendants, and which amount defendants claimed by way of set-off. Jury trial having been waived, the case was heard by the Presiding Justice of the Superior Court, who disallowed the claim in set-off and gave a decision for the plaintiff for \$6,219.65, which is agreed to be the amount due plaintiff unless the set-off claimed should be allowed.

The case is in this court on defendants's bill of exceptions whereby it is alleged that the decision of the Superior Court is erroneous and contrary to the evidence. There is no allegation in particular of any error in the proceedings. The sole question is in regard to the right of the defendant to the benefit of the set-off as claimed. At the hearing in this court defendants for the first time

made the claim that the form of action, *assumpsit*, was wrong. This objection, even if it were valid, which we do not consider it to be, is not properly before this court. Defendants have never raised this question in the trial court. By pleading to the action without objection to its form and by proceeding with the trial without objecting thereto at any stage of the proceedings, defendants are now precluded from raising this objection.

Another claim is that in effect the suit is against the State and the courts are as a consequence without jurisdiction in the matter. Although this question has already been decided adversely to the defendant's claim, and without objection taken in the lower court, yet as perhaps it is involved to a certain extent in the decision of the claim of set-off we will consider it briefly.

Chapter 203, Gen. Laws, of "Private and Several Oyster Fisheries," provides for the election by the General Assembly of five commissioners of shell fisheries, who are empowered to lease in the name of the State "to any suitable person being an inhabitant of this State" certain designated lands as private oyster grounds, but not more than one acre at a time in one lot or parcel to any one person or firm. By Section 25 the commissioners are required to see that the terms of the leases are complied with and on failure of the lessee to pay rent punctually or on breach of the lease, the commissioners are required to enter on the leased land and terminate the lease. They may in the name of the State (Sec. 26) institute legal proceedings for the collection of rents, take possession of and sell at public auction any lot leased with the oysters thereon, and receive the directed "from said proceeds to retain all sums due and owing the State for rent as aforesaid, together with all expenses incident to such sale, rendering and paying the surplus of said proceeds of sale, if any, there be over and above the amounts so to be retained as aforesaid, to said lessee, his heirs, exec-

utors, administrators, or assigns."

There is practically no dispute in regard to the facts. Prior to 1914 Ardelia C. Dewing was engaged in the oyster business in this State. In addition to other leases from the State, Mrs. Dewing held twelve leases bearing date at different times from January 5, 1907, to January 27, 1912, each for ten years, which are the particular leases upon which plaintiff's claim is based; she also held three other leases, one dated May 22, 1905, and two dated January 29, 1906. The plaintiff Gladding, who was the manager for Mrs. Dewing's business, held six leases of oyster lands dated at different times from May 7 to September 27, 1907. In 1913 the M. Dewing Co. acquired the oyster business and property used therein belonging to plaintiff and Mrs. Dewing. In 1914 this company was petitioned into bankruptcy. In 1915 Mrs. Dewing died and her estate was declared to be insolvent. In 1916 the commissioners of shell fisheries took possession of the twelve leases of Mrs. Dewing for non-payment of rent due thereon, and sold the same with the oysters on the lots at public auction for \$12,100. The commissioners also sold separately the six leases belonging to Gladding for \$37. At the time of this sale there was due to the State of Rhode Island from Gladding upon these leases the sum of \$4,157.44. Long prior to 1916 the commissioners had terminated the three leases of Mrs. Dewing, of the years 1905 and 1906, and there was due on these leases for rent, interest, etc., \$639.44. These leases were not included in the sale made in 1916. The two last mentioned claims, namely, the Gladding claim and the Dewing claim for \$639.44, constitute the basis of defendant's set-off.

The plaintiff, as executor, acting under authority of the Probate Court, assigned to the trustees in bankruptcy of the M. Dewing Co. all of the interest of the estate of Ardelia C. Dewing to the proceeds of the sale of the twelve leases and brings suit for the benefit of the assignees. Is this a suit against the State? This question is to be decided not by ref-

erence simply to the parties of record but upon consideration of the essential nature of the suit and the effect of the judgment therein. In the Matter of the State of New York, 255 U. S. The special pleas and the facts alleged therein are now out of the case. *Wilson v. N. Y., N. H. & H. R. R. Co.* 18 R. I. 598; *Neri v. R. I. Co.* 42 R. I. 229; *Ilczyzyn v. Mos-tecki*, 43 R. I. 523. There is now no plea or any formal suggestion on the record that this suit is one against the State, nor is there any proof that the money sued for is in the possession of the State under claim or color of title. The leases contain covenants by the State, the lessor, for quiet possession and by the lessee to pay a fixed amount annually to the State treasurer, and that lessee will not underlet or assign the premises to any person without the assent in writing of the commissioners. It is not claimed that there was any written assignment made by Gladding and assented to by the commissioners. Whatever the relations may have been between plaintiff, Mrs. Dewing and the M. Dewing Co. the relation of the State with plaintiff remained unchanged, namely, that of lessor and lessee. The doctrine of undisclosed principal is not applicable, and it is immaterial whether the leases were under seal or not. The Dewing Co. being a corporation is not permitted by the statute to take a lease from the State. If the State can hold Mrs. Dewing for the rents as an undisclosed principal she would be entitled, if the leases were not under seal, as against the State to hold the leases made to her alleged agent Gladding. *Batley v. Lunt & Co.*, 30 R. I. 1. The result would be to make the statutory provisions against subletting and assignment inoperative and of no effect. The purpose of the statute is clear. By limiting the persons who are eligible to receive leases to individuals who are inhabitants of the State and by restricting each lease to one lot, it is apparently the intent of the act to enable the commissioners to prevent any one person or firm from securing a monopoly of the oyster lands and to confine the benefits and ob-

ligations of the lease to the lessee named or his duly recognized assignee. The debt of Gladding was a debt to the State and not to the commissioners. The authority of the commissioners to sue therefor in the name of the State is permissive but not exclusive, as the State is not restricted to this one action by the commissioners. The duties of the commissioners under Section 26, where a surplus of proceeds remains after possession taken and public sale, are clearly defined by statute and require no exercise of discretion. They are to pay over the surplus arising from the sale to the lessee. This is the mandate of the State and the lessee has thereby a valid claim given to him by the State against the individuals who have such surplus in their possession. If the commissioners pay over this surplus to the State treasurer they do this of their own wrong and contrary to law. They can not claim exemption from any suit by the lessee on the ground that by their wrongful act the State has come into possession of money which belongs to the lessee. A judgment in this case would run against the defendants individually and the State, not being a party, is not bound by it. *Tindal v. Wesley*, 167 U. S. 204. The mere fact that the State may have possession of the property does not in itself determine the question whether the State is the real defendant nor does it preclude an enquiry by the courts into the lawfulness of that possession or the right of the State to retain it. *U. S. v. Lee*, 106 U. S. 196; *Phila. Co. v. Thurston* 223 U. S. 605. The claims in set-off are claims of the State and not of the commissioners. As they are not claims which belong to defendants in their own right for which they might maintain a suit in their own names (Sec. 11, Chap. 288, Gen. Laws), they are not properly subjects of set-off in this suit.

Defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the decision.

For Plaintiff: Curran & Hart.

For Defendant: A. A. Capotosto.

Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 11

DECEMBER 16, 1921

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

MONDAY, DECEMBER 19, 1921

Ex5489 B S & L	Mary Whalen vs C. M. Dunbar	W & G
Ex5495 A & A- J B	In re John W. Rathbun	
& A B W		
Ex5527 J H C	Hugh McGuckian vs W. J. Powers	F H W
Eq 517 B W G	D. M. Bova et al vs A. Buonanno	B C

WEDNESDAY, DECEMBER 21, 1921

Ex5539 C R E	Agnes Hennessey et al vs Daniel Hennessey, Gr.	Q & M
Ex5503 H E & M	D. K. Barrett vs Rhode Island Company	C W
Ex5499 A P J	Edgar Peltier vs Herman Pearson	J F M
Eq524 L B & M	H. G. Sayer et al vs Clark, Sayer & Wall, Inc.	S D P

FRIDAY, DECEMBER 23, 1921 (No Assignments)

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, DECEMBER 19, 1921

46319 E & A	Hartford Accident & Ind. Co. vs J. F. Paine	W & W
Eq5376 C & B-G	C. I. Gage, Tr. vs Alice Shove et al	H E & M
47440 Breden	Excelsior Steam Eng. Co vs Jennie Sinclair	
Eq5640 T & C	Builders Iron Foundry vs Kinsley Ave. Land Co.	
51188 G W B	Paul Mortkivian vs Wm. C. Toner et al	J C C
Eq5642 J P B	J. F. Hawkins vs Bradford Campbell	
Kent A & A	Clara C. Camire et al vs Mabel M. F. Clarke	Zeigler
Eq5412 E & A	Chas. S. French et al vs French Knitting Co.	
Eq5511 H E & M	Hartford Fire Ins Co. vs A. C. Messler	W & G
38517 W & G	A. C. Messler vs Citizens Ins. Co. et al	H E & M
Eq4754 N W L	John M. Magoon vs John S Briggs	W & G
51544 G M & H	M. Steinert & Sons Co. vs L. H. Borod	C R E

41867 M Silvi
Eq4505 E & A
Eq5641 G E & C
50178 P & DeP
50179 P & DeP

M. Silvi vs C. H. Griffin et al
Cora M. Perkins vs C. H. Perkins et al
Stella F. Paine et al vs Town of Bristol
A. Zannella vs G. Elastic Fabric Co.
L. Zannella p. a. vs G. Elastic Fabric Co.

W A G

F A J
F A J

TUESDAY, DECEMBER 20, 1921

Pet.280 J R H
Pet.321 C R B
51499 M & M
50467 W A G
47295 C & B
44795 E C S
Eq5627 Q & McK
50200 H A Rice
Eq5650 Higgins
Eq5651 Pettine

Peter Reynolds vs Blackstone Val. G. & E. Co.
T. F. Mournaghan vs Jacob Conn
B. H. Burdon vs Herman Unrath
A. M. Swanson vs F. H. Swan et al
S. Tourtellot & Co. vs Arthur Simoneli
Hood Farm, Inc., vs Samuel P. Colt
John L. O'Rourke vs Luke P. Walsh
R. W. Jennings, G. T. vs U. S. Bobbin & Shuttle Co.
F. La Rose et al vs Archie Plante et al
G. Scoppio vs V. Cannella

Richard

W & G
Williams
J V
W T O'D
W S F

Jones

WEDNESDAY, DECEMBER 21, 1921

Pet.329 S I J
Eq5497 J C S
Eq5647 G H & A
Eq5531 N Hilfer
Eq5452 McG & S
51418 B-P & DeP
Eq5639 Q & McK
50644 Rich

Alfred Edwards vs Builders Iron Foundry
A. Furtado vs Frank Silva et al
Alex Gilbert vs United Land Company
J. C. Morx vs Globe Mfg. Co.
Robert B. Dewers vs Ind. Chem. Co.
John Pesce vs James J. Judd
Peter W. McKiernan vs M. J. Gallant et al
Martha H. Haynes vs A. S. Greene

T & C
E R WD E G
J B Lawlor
M D C

Jury Trial Calendar

MONDAY, DEC. 26—TUESDAY, DEC. 27, 1921
(No Assignments)

WEDNESDAY, DECEMBER 28, 1921

47567 McKenna
47083 L B & McC
41110 S&S-P&DeP
41129 S&S-P&DeP
47110 Colton
47365 Curran & H
50659 F & H
50660 F & H
51146 B & B
40322 F & M
40323 F & M
42829 C & Cooney
49630 Veneziale
47364 C A K-C&H
49381 A S J-J

Charles Johnson et al. vs Rose C. Zarr
Mike Onegan vs Fred S. Crawford
Francesana Paone vs Rhode Island Company
Erasmus Paone vs Rhode Island Company
Vincenzo Fazzione vs Frank Simone
Mary L. Morrell vs Alphonsine J. LaLonde, et al
Peter Campanini, p. a. vs William D. Shaw
Maria Targnoli vs William D. Shaw
Robert Jensky vs Philip Gerber et al
Teresa Toti vs Walter L. Clarke, C. T.
Antonio Toti vs Walter L. Clarke, C. T.
Francesco Lebrandi vs Anatasia P. O'Keefe
Antonio Cornelli vs Thomas Langelo
Frank Morrill vs Alphonsine J. Lalonde
Henri Bendel, Inc. vs Matie C. Messler

Stiness
Vance
C W-S
C W-S
B & B
H E & M
S K & S
S K & S
Bromson
E S Chase-H
E S Chase-H
C & Canning
J W Grimes
H E & M
W & G

THURSDAY, DECEMBER 29, 1921

48907 J Brennan
48909 F & H
50166 J Smith
50167 J Smith
45295 Com & C
46428 J P Beagan
50630 Ziegler
50716 Stiness
50719 B & B
47330 A B West
50070 J Henshaw

Michael Shekon vs Yooraki Mahati
Yoraki Mahati vs Michael Shekon et al
Louis Covinsky vs Frank Shaw
Harry Covinsky vs Frank Shaw
Helena F. Hynds vs Rhode Island Company
Augusta R. Ross vs Rhode Island Company
Alice Anderson vs Rhode Island Company
Providence Buick Co. vs S. Klein
S. Klein vs Providence Buick Co.
Joseph I. Milman vs Antonio Prete
J. Urban Edgren vs Providence Journal Co.

F & H
Brennan
H Carpenter
H Carpenter
Williams
Williams
C-Whipple
B & B
Stiness-M-B
W Gammino
Barnefield

FRIDAY, DECEMBER 30, 1921

48762 W Prescott Samuel Faber vs W. E. Devine et als.
 49990 L Pouliot Raymond J. Galvin vs Dummy Johnson
 45273 F & H. Rose E. McEnaney vs Rhode Island Company
 46425 S & Sul Themistocle Faraone vs Giuseppe Pofi
 44676 P & DeP Vincenzo Manfredo vs Teresa D'Agostino
 50717 Stiness The Designer Pub. Co. vs Dimond Company
 51201 F & H William A. Davis vs John H. Sanders
 49335 P & DeP Cosmo Votta vs John J. Johnson

J H Coen
 Sweeney
 C & C
 L V J
 P C Joslin
 Carr
 McGovern & S
 McG & S

SUPREME COURT

Frank J. Rivelli, et als }
 vs } M. P. No. 360
 Providence Gas Co. }

City Council of }
 Cranston } M. P. No. 361
 vs }
 Providence Gas Co. }

OPINION

SWEENEY, J. These are appeals from an order and decree of the Public Utilities Commission dismissing the complaints of the appellants, and are heard together in this court upon the transcript of the evidence taken before said Commission.

The reason for the complaints was the filing, April 14, 1920, by the Providence Gas Company with the Commission, of a schedule of rates to take effect May 17, 1920. The schedule of rates thus filed increased the rates for gas, provided for a service charge of fifty cents for each meter each month, and lowered the standard of the gas.

The appellants filed objections to the proposed schedule with the Commission, and the City Council of Providence also filed its objections to the proposed rates. All of said objections were heard together by said Commission in July, 1920, and at the same time the Gas Company was given an opportunity to introduce testimony to justify the changes made by its proposed schedule. Eight days were occupied in presenting testimony or reading exhibits, and the transcript of the evidence produced in this court is voluminous.

The Commission made a careful examination and analysis of the evidence

presented to it and found that the Gas Company had sustained the burden of proof imposed upon it by showing the necessity for the increased rate: that the service charge was reasonable: that the schedule of rates as filed was just and reasonable: and that the reduction in the standard of gas, under the conditions then confronting the company, was necessary, and denied and dismissed the complainants on the 14th day of May, 1921.

The City Council of Providence claimed no appeal from this action, but the City Council of Cranston and the complainants Rivelli and others duly claimed appeals therefrom to this court

The appellants claim in their reasons of appeal that the imposition of the service charge is illegal and unreasonable; that the lowering of the standard of gas is unreasonable; and that the proposed schedule of rates is unjustly discriminatory.

The schedule of rates was filed by the Gas Company with the Commission as required by Section 48, Chapter 795, Public Laws, 1912, known as the Public Utilities Act, which provides, among other things, that no change shall be made in existing rates, excepting after thirty days' notice to the Commission and to the public of the changes proposed to be made in the schedule then in effect, and the time when the change of rates will go into effect. The Commission has no authority to fix rates for a public utility excepting when, after a hearing and investigation it finds that the existing rates are unjust, unreasonable, insufficient or unjustly discriminatory, or to be preferential or otherwise in violation of the provisions of said Public Utilities

Act. Section 21, Chapter 795, Public Laws, 1912.

The Commission found that the service charge made by the company, in the schedule of rates under consideration, was reasonable and that if such a charge was not made it would be necessary to directly increase the price of gas.

The applicants now claim that the service charge is illegal because it is in violation of Section 53, Chapter 345, General Laws, 1909, which provides, among other things, that every person or corporation who shall wilfully collect a larger sum for gas than appears to be due on inspection of the meter put in to register the same shall be fined not exceeding five hundred dollars. This law does not penalize the collection of a service charge. It only provides a penalty on any person or corporation for wilfully furnishing a meter which does not correctly register the quantity of gas consumed, or who collects a larger sum of money for gas than appears to be due upon an inspection of the meter. It imposes a penalty for using meters incorrectly registering the amount of gas consumed, or for wilfully collecting money for gas not shown by the meter to have been consumed.

The service charge is a uniform charge to all customers which, together with another charge based upon the amount of gas consumed as shown by the meter, constitutes the entire amount to be paid. The service charge is an equal distribution of those burdens incident to the manufacture and distribution of gas which should be borne by all consumers, irrespective of the quantity and neither the small consumer nor the large one is compelled to carry a load that should be shared by both.

The principle of the service charge has been allowed by many public utilities commissions throughout the United States on the ground that it is equitable and just. In the case of the Rochester Gas & Electric Corp., Public Utilities Rep. Ann. 1921 A, p. 415 at p. 420, in

allowing a service charge, the commission said: "The corporation provides and installs meters and it bears the expense of the pipe from the main to the property. Here is an investment upon which it is entitled to a return and which is constant, whether gas is used or not used. Meters must be inspected and kept in repair and so must the service pipes. Meters must be read whether gas is used or not, accounts must be kept with the individual consumer and bills must be rendered and accounts collected. While the rendition and collection of bills is not regardless of whether any gas is consumed, the expense in nowise relates to the amount of the consumption, and it is, therefore, a charge which should be distributed among the customers as a total. Meters and services depreciate regardless of the consumption and the total depreciation depends upon the number of meters and number of services."

It would be possible to increase the rates for furnishing gas used so as to cover the service charge. When the consumer uses such a small quantity of gas that the profit upon it will not defray the cost of serving him with it, it is not unreasonable that he should be required to pay for such service in addition to paying for the gas used by him.

The Commission found that the reduction in the standard of gas was necessary under the conditions then confronting the company. The company presented testimony to show that it has ample equipment to produce coal and gas and water gas in sufficient quantities to meet the requirements of the people living within the territory served by it. It was also shown that owing to the extraordinary conditions then existing it was impossible for the company to get its necessary supply of gas coal and oil to produce coal gas and water gas, at prices sufficiently low, to enable it to continue to sell gas to its consumers at the proposed rate without lowering the standard or quality of the gas. The testimony also showed that the lowering of the standard of gas would affect the

use of gas for illuminating purposes but slightly as only five per cent. of the gas manufactured is used for this purpose, and the objection to the lower standard of gas could be easily overcome by the use of mantles instead of using the open flame burner; and that the lower standard of gas would affect but little its use for heating or industrial purposes.

The claim that the schedule of rates is unjustly discriminatory is based upon the claim that the service charge is illegal and places an unjust burden upon the so-called "small consumer." Inasmuch as we have held that the service charge is legal, and applies to all consumers alike, it cannot be held to be unjustly discriminatory.

An analysis of the testimony is stated at length in the opinion of the Commission and it is unnecessary to incorporate it in this opinion.

After a careful consideration of the facts, as shown by the testimony and the law applicable thereto, the court is of the opinion that the claims made by the appellants cannot be sustained and, therefore, the order and decree of the Public Utilities Commission appealed from is sustained and affirmed, and the appeals therefrom are denied and dismissed.

SUPERIOR COURT (WASHINGTON COUNTY)

New Haven Iron &
Steel Co.

vs

Walter J. Westlake,
Collector of Taxes

Equity
No. 178

RESCRIPT

SUMNER, J. This is a bill in equity brought by the New Haven Iron & Steel Company, a corporation, against Walter J. Westlake, Collector of Taxes of the town of Narragansett, alleging that the Tax Assessors of the town of Narragansett on August 15, 1918, assessed cer-

tain buildings, termed by them, "Mathewson Hotel buildings," against the complainant, and set forth a tax thereon of \$1080; that respondent had levied upon said property and was about to sell the same; that the proceedings of the respondent in connection with the attempted sale of the property were illegal and for the following reasons, namely: that said property was not lawfully described for the purpose of assessment; that there was no distraint of said property as required by law; that there was no lawful levy thereon and that said buildings were personal property at the time of said assessment and not real estate as described in the notice of sale and the assessment.

Accordingly, the complainant prays for a permanent injunction restraining respondent from attempting to sell or dispose of said property.

It appeared in evidence that the Tax Assessors had in the assessment roll placed the property in question, namely, "Mathewson Hotel buildings," under the heading, "Building and Improvements," and not under the heading "Tangible Personal Property," and that upon the non-payment of the tax assessed respondent had proceeded to levy thereon as though the property were real estate. Complainant introduced an agreement, signed and acknowledged by one Samuel Tuch and itself, wherein said Tuch conveyed the "group of buildings comprising the Mathewson Hotel" to the complainant for the purpose of wecking them, and giving complainant until Aug. 30, 1919, to complete their removal from the premises. This agreement was dated July 8, 1918, and complainant claims thereunder. Complainant also introduced an agreement between the estate of William B. Banigan (executed by Emma T. O'Connor, executrix), and said Tuch, dated June 10, 1918, wherein the Banigan estate conveys the said buildings to said Tuch for the purpose of wrecking and disposing of them, said wrecking to be completed by August 30, 1919.

Complainant's treasurer testified that the various inside fixtures were first sold

at auction for his benefit and that he began to wreck the buildings about the middle of July; that at that time only the shell of the buildings remained; that the neighbors objected to the flying shingles and plastering, so that before much progress had been made he desisted, namely, about the first of August, and waited until the season was over and completed the wrecking in the fall. It also appeared that the land upon which the buildings were situated was taxed at this time to Emma R. O'Connor, trustee, and a copy of a mortgagee's deed was introduced showing the conveyance of this whole estate, including the land, to Emma T. O'Connor, trustee, under the will of William B. Banigan, on Nov. 30, 1917, which said deed was recorded Dec. 1, 1917. A certificate of the Deputy Town Clerk of Narragansett shows that there have been no conveyances of record relative to said property since Dec. 1, 1917.

Complainant contends that the tax was illegal, because, first: the resolution passed by the financial town meeting was not in compliance with the law; second; that the property of complainant was personal property and under the law should have been so classified and taxed; and third: that the proceedings begun by the collector for the sale of said property were not in compliance with the law.

The first objection of the complainant is that certain clauses prescribed by Chapter 1211 of the Public Laws were not inserted in the body of the resolution passed by the financial town meeting. These clauses in substance direct the Town Clerk to deliver a copy of the assessment to the Town Treasurer, who shall issue and affix to said copy a warrant under his hand directed to the Collector of taxes commanding him to collect the tax. As far as appears these prescribed duties were properly performed by the officials notwithstanding the lack of the directions in the vote.

The opinion in *Pendelton vs. Briggs*, 37 R. I. 352, says: "It must be borne

in mind, in the consideration of these questions, that an action for the recovery of a town tax cannot be defeated by mere irregularities which do not go to the jurisdiction of the assessors or deprive the defendant of some substantial right."

The court feels that the complainant was not deprived of any substantial right by this omission.

The gist of the second and third grounds is that the property should have been assessed as personal property and levied on as such.

The question for us to consider, then, is: Were these buildings on August 15, 1918, real estate or had they been actually or constructively severed and so become personal property?

In *Lindgren vs. Doughty*, 32 R. I. 528, the court held that a building upon leased land, the lease whereof had not been recorded, was personal property and that the levy thereon as real estate was invalid. This case is different in that there is no lease and the building was at one time a part of the realty.

Cyc. Vol. 37, page 778, says: "The question whether they (buildings and improvements on real estate) are taxable as realty or personalty depends on the rules ordinarily applicable in such cases, with reference to their permanent character, the right of lessees to remove them, and other such tests.

Again, Cyc. Vol. 19, page 1070. "After property has become realty, it is said it may become personalty by force of agreement of parties in interest," citing *Manwaring vs. Jenison*, 61 Mich. 117, and *Madigan vs. McCarthy*, 108 Mass. 376.

Under the rule as above laid down by Cyc. the tests of whether buildings on land of another are taxable as realty or personalty are their permanent character, the right to remove them, and the agreement of the parties in interest.

This rule is also supported by *Schuchardt vs. Mayor*, 53 N. Y. 202, wherein the court says: "The rule of common

law that whatever is annexed to the freehold becomes a part of it may be controlled and modified by agreement between the owner and the person by whom the annexation is made The owner may reserve from a conveyance of land, trees or buildings thereon, in which case they will in contemplation of law be regarded as divided and severed from the sod and will vest as chattels in the grantor even before actual severance."

See *Corcoran vs. Webster*, 50 Wis. 125, to the same effect.

In *Poor vs. Oakman*, 104 Mass. 309, the court says: "Not only a structure but trees, grass, stone in a quarry and other things which are a part of the realty may be sold, by oral agreement, and removed by virtue of an oral license; but it is well established law that before severance of the owner may revoke the sale and the license and no title will have passed to the purchaser" The ground of these decisions is that the statute of frauds requires that a sale of any interest in real estate, in order to be valid, must be in writing. In this case the owner of the land, the estate of William B. Banigan, had by written instrument, conveyed the buildings in question to Tuch and he in turn had conveyed to the complainant. Under the reason of the rule laid down in *Poor vs. Oakman*, *supra*, as the conveyance was in writing, an actual severance was unnecessary. If, however, a severance was necessary, as some authorities seem to imply, the fact that the interior of the buildings had been stripped and only the shell remained, and that the complainant had actually begun to tear down this shell before August 15, the date of the assessment,

would seem to indicate that a constructive, if not an actual severance, had been made.

In nearly all the cases where this question has been raised there have been conflicting rights of mortgagees or creditors to be adjudicated, and for that reason the lines have been very carefully drawn. Here there is no such conflict of claims, and the court may very fairly, in weighing the evidence, be guided by the evident intention of the parties. The fact that the land was taxed to Emma T. O'Connor, trustee, and the buildings to the complainant, clearly indicates that the assessors considered that the Banigan estate had parted with its interest in the buildings. There are no conveyances of this property in the real estate records subsequent to the deed to Mrs. O'Connor, trustee, and we can only imagine why the assessors saw fit to tax these buildings to complainant (for the same amount that they had taxed them to Mrs. O'Connor, trustee, the preceding year), while taxing the land separately to Mrs. O'Connor, trustee.

The court believes that the assessors in placing this property in the column of "Buildings and Improvements," assessed it as real estate, and this belief is borne out by the statement of the respondent collector that he levied upon it as real estate.

The court finds that the buildings in question on August 15, 1918, by intent of the parties and by constructive or actual severance were personal property and should have been so assessed and levied upon; and that the attempt of the collector to levy upon them as real estate was invalid.

The complainant is accordingly entitled to relief.

Francis I. McCanna (Lee, Boss & McCanna), for Complainant.

Benjamin W. Case for Respondent.

SUPERIOR COURT

Samuel Flink
vs.
Samuel Neuberger } No. 51052

RESCRIPT

December 12, 1921

TANNER, P. J. This is an action of assumpsit heard upon defendant's demurrer to the second count of plaintiff's declaration.

Said court alleges that plaintiff hired a summer cottage of the defendant but that said cottage was dirty and contained vermin, and was not fit for habitation; that this condition was not apparent to plaintiff but was known to the defendant who neglected to notify the plaintiff; that, as a result, plaintiff vacated said cottage, surrendered possession, and now sues for the rent which he paid in advance and also for damages by reason of the expenses of being obliged to move.

It is well settled that there is no implied warranty as to the condition of premises let. It is true, however, the lessor is under obligation to reveal defects known to himself and not known to the lessee. Neglect to perform this duty may render a lessor liable for any damages occasioned thereby. If the defect be of so serious a character that it cannot be readily remedied, it may even justify the lessee in abandoning the premises. The defect here complained of, however, is the filthy and verminous condition of the house. Such a condition can usually be readily remedied by well-known means. We do not think, therefore, that such a condition would justify a lessee in abandoning the premises.

Pomeroy vs. Tyler, 5 N. Y. State, 514.

Hart vs. Winsor, 12 M. & W., 68.

The demurrer is therefore sustained.

For Plaintiff: Philip C. Joslin.

For Defendant: Frederick A. Jones.

SUPERIOR COURT

Hazen Maxwell
vs.
Alexander Weiner et al. } No. 50121

George S. Bell
vs.
Alexander Weiner et al. } No. 50085

RESCRIPT

December 15, 1921

TANNER, P. J. These are actions at law for negligence resulting in personal injuries.

The person alleged to have caused the injury, together with the company insuring him against liability, are both made parties in each of these cases. The actions were brought and pending when Chapter 2094 was passed at the January session, A. D. 1915. This chapter provides that the insured and insurer should not be sued jointly.

The defendants claim that this statute operates to abate the actions and have moved to dismiss them. The defendants rely chiefly upon the case of Dillon vs. Linder, 36 Wis., page 344. The general statutes in that State provide that no pending actions at law or criminal prosecutions founded upon a statute shall be defeated by the repeal of the statute, but that all such shall proceed to issue, trial and judgment in the same manner and for the same purpose and effect as if the statute continued in force.

The court holds that this statute relates exclusively to the proceeding and not to the right given. It therefore reasons that where a right is given by a statute and that statute is repealed by another statute, the whole right of action is abolished.

There is much force in this reasoning, but our own statute at Chapter 32, Sec-

tion 16, General Laws of 1909, seems to go much further than the Wisconsin statute and provide that the repeal of any statute shall in no case affect any act done or any right accrued, acquired or established, or any suit or proceeding had or commenced in any civil case before the time when such repeal shall take effect.

The statute right, therefore, of suing the insurer and the insured in one action does not seem to have been abolished by the repealing statute.

In re Dyer Street, 11 R. I. 166.

Rotchford vs. Union Railroad Co., 26 R. I. 70.

Furthermore, both the repealed and repealing statutes seem to give and preserve the same right, that of making the insurance company directly liable to the injured person. The repealing statute, therefore, would not seem to abate the action pending under the repealed statute because it does not destroy but preserves the right upon which the action was brought. There is, of course, considerable difference of procedure, but the fundamental right remains the same.

Motions to dismiss are therefore denied.

For Plaintiffs: William H. McSoley.

For Defendants: Huddy, Emerson & Moulton.

CLIENT WAS SORRY

Maurice Robinson wrote a letter recently to a client, informing him that his wife's motion for allowance in connection with their divorce suit was coming up for hearing the following Saturday and asking him to be present in court.

In his reply the client had this to say: "I am sorry to state that me and my wife have been living together again for the last 10 days, so I guess I won't need to go to court Saturday."

John Henshaw

Joseph C. Sweeney

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A youth who said he was an ex-service man called at the office of the Rhode Island Law Record on his tour of the down-town office buildings selling an eight-page booklet, entitled "The World War American Expeditionary Forces," at 25 cents a copy. He said he was out of work and unable to get employment. On the front cover page was the subjoined verse, entitle "Our Boys:"

For Country's sake they bravely fought
The foe across the sea.
And now they starve beneath the flag
They bore to Victory.

And on the field of Sunny France
They left their noble dead
And now they walk the streets at home
In need of daily bread.

And, oh, the pity of it all
Here in their own home land
There seems to be no one to give
The Boys a helping hand.



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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 14

JANUARY 6, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

MONDAY, JANUARY 9, 1922

Ex5440 SJC-WC&C O. P. Lee vs E. E. Jones et al.
Ex5544EMS-JJS J. L. Greene, Gdn. vs Town Council of Warwick
Ex5445 F H W Millers, Inc. vs Rhode Island Company

GH&A-BWG
H R C
CW-HEE

WEDNESDAY, JANUARY 11, 1922

FRIDAY, JANUARY 13, 1922

Eq528 J P B Pcter R. Morris vs B. V. Morris, et al.
Ex5557 C R E Sarah J. Atkinson vs M. Birmingham et al.

F & H
OLH-WRP

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JANUARY 9, 1922

J.T.W.50730 E & A Warren H. Titus vs Providence Buick Co., Inc.
49656 F & H Harry Bromberg vs Samuel Gertz
Eq5658 A B W Beatrice W. Weinbaum vs Trinity Sq. Jewelers, Inc.
52116 P & DeP Michael Viti vs St. Paul Fire Marine Ins. Co.
42328 P J Kneuer John P. Brennan vs John R. White & Sons, Inc.
4628 Troy Giuseppe Rentino et al vs Orazio Tafuri
Eq5670 Horenst'n Theresa Pettnocio vs Luigi Geremia et al
43927 Chaffee G. E. Mathewson vs Thomas K. Fisher
Eq5677 Murphy B. Schalab vs Royal Bedding Co.

E C S-M
W M P B
J R H
R T B
G M & H
Pettine
R & R

TUESDAY, JANUARY 10, 1922

51616 McG & S Jacob Ernstof vs Nut Grove Butter Co.
51617 McG & S Jacob Ernstof vs Nut Grove Butter Co.
Eq5312 B & B Benj. Brenner vs E. A. McCardell et al.
51623 Ziegler L. E. Patterson vs Owen A. Bartell
47295 C & B S. Tourtellot & Co. vs Arthur Simonelli
5650 J R H Felix La Rose et al. vs Archie Plante et al.

W C & C
W C & C
E & A
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49899 I Marcus	John Preiss vs Albert L. Midgley et al.	H E & M
Eq5669 C R E	Margaret Baffi vs Anthony Albanese	
Eq5660 West	Beatrice Weinbaum vs J. M. Weinbaum	
Q & McK	Patrick Hurley vs George Saon	
Bennett	V. J. Manoojian vs Pequot Cleansing Co., Inc.	

WEDNESDAY, JANUARY 11, 1922

Eq5436 Com & Can	John J. Nelson et ux. vs F. C. Pettis et al.	F & H
52008 R & R	A. Ersenstadt et ux. vs M. De Wolf Madge	W & G
47489 J F L	Jacob Alpert vs C. O. F. Thompson et als.	W & G
Eq5662 Q & McK	W. E. Devine vs Home Cafeteria, Inc.	
Eq5627 Q & McK	John L. O'Rourke vs Luke P. Walsh	W S F
Wash. N. W. M.	William N. Moore et al. vs N. E. Supply Co. et al	
Eq5376 C & B	Clara I. Gage, Tr. vs Alice G. Shore et al	H E & M
Eq5676 B & B	J. Pastina vs Michael Zeoli	
Eq5678 Costello	J. E. Costello vs Costello Bros. Realty Co.	

Jury Trial Calendar

MONDAY, JANUARY 16, 1922

47546 Flynn	City of Providence vs George K. Sepsas	McG & S
49216 P & S	James E. Mitchell Co. vs William M. Jette	A & A
49346 P & DeP	Felicia Soletro vs Michele Cornicelli	Jack-Cap
46560 C A Walsh	William F. Loughrey vs Daniel H. Morrissey, Ad'm.	C J Brennan
36539 B & C	Lawrence B. Fogarty vs Rhode Island Company	Whipple-S
36546 B & C	Gertrude M. Fogarty vs Rhode Island Company	Whipple-S

50821 R & R	Ralph Orleck vs Gussie Feinstein	Wildes
50774 G M & H	Union Trust Company vs Sidney Kapland	Joslin
49641 F & H	J. D. Halliday vs B. Flink & Sons	P C Joslin
51368 J Semonoff	Schuk Motors Company vs Octave O. Eno	F & Mahoney
51430 J Semonoff	Jesse Silva vs Jesse Sousa	
51457 Cooney & C	Margaret A. Shields et al. vs United Sig. Ry. Co.	C & Hart
51684 C R Easton	Margaret Cameron vs Fred Jencks	J J McCabe

TUESDAY, JANUARY 17, 1922

49157 Gunning	George H. O'Brien vs Frederick W. Wallace	Jones
48137 G M & H	Standish Wor. Co. vs Seymour Chem. Co., Inc. et al.	G H & A
49189 M & T	Bargain Cap Works vs D. Frank & Sons Co.	Q & K
43588 P & DeP	Frank Antonangeli vs Rhode Island Company	Sweeney
45673 McG & S	Samuel Frank vs Pincus Wax	C & C
50496 W C Brand	Ward Elliott vs Annie M. Creamer	H E & M
50730 E & Angell	Warren H. Titus vs Providence Buick Co.	E C S
49863 B & B	Isaac Beck vs Leo R. Boudron	J L Curran
45768 F & H	Fernando King, Admr. vs Thomas F. O'Donnell	Brand
51495 W Flynn-F	W. Stuart Caton vs Star Rubber Co., Inc.	G H & A
49802 L F Nolan	Mary A. Carroy vs Frank L. Backus	J. Ousley
51825 Joslin	E. E. Smith Co. vs Thomas F. Keeher	F F Nolan
50759 F & M	George W. Gill vs Ernest Bolderson	L B & McC

WEDNESDAY, JANUARY 18, 1922

48802 P & DeP	Antonio Turgione vs The Fairbanks Co.	R T B
48803 P & DeP	Guiseppina Turgione vs The Fairbanks Co.	R T B
50346 Hartigan	Imperial Knife Co. vs Am. Railway Express Co.	G H & A
39868 C & Cooney	Felix Dzikowski vs Rhode Island Company	Whipple-W
48647 Morrissey	Henry T. Wright vs Ambrose Desilets	McG&S-FHH
48648 Morrissey	Mrs. Henry T. Wright vs Ambrose Desilets	McG&S-FHH
48649 Morrissey	Mrs. Julia Riley vs Ambrose Desilets	McG&S-FHH
50605 Heathman	Jessie Simpson vs Rena Billinghoff et al.	Henshaw-L
51012 Stiness-M	S. Korach Co. vs Moshassuck Valley R. R. Co.	E & Angell
51037 C & Ball-G	Joseph Winokee vs Frank Nichols	Wildes
51195 G E & C	Andrew H. Hall vs Charles Lafontaine	Sullivan-S
45662 F & H	Emma R. Southey vs Walter L. Clarke. C. T.	E S Chace
51422 Broth'rs-McE	Mary E. Hogan vs Walter L. Clarke, C. T.	E S Chace
51445 Q & Kernan	Pugh Brothers Co. vs F. W. Baxter	R & H
50433 Stiness-M-B	Thomas H. Kelley vs Mary T. Case	W C Brand

THURSDAY, JANUARY 19, 1922

49389 L B & McC	Carmine Cranquith vs Antonio Catanzaco	J Venezia
49390 L B & McC	Luigi Granquith of Antonio Catanzaco	J Venezia
50398 Ziegler-K	Jane Redfern vs Richard Rosa	J Venezia
50282 J Witherow	A. Cassatley Co. vs Bedo Tahan	Rustigian
50348 Whipple-E	Frank H. Swan et als., Rec. vs Ralph S. Krauss	Q & K
50974 Gunning	Lucian Giroux vs Norman F. Harris	P & S
51224 Nathanson	Isaac Perlman vs Abraham Fishman	Helford
48818 E C S	Firestone Tire & R. Co. vs Intercon. Truck Co.	J C S
51426 F & H	Joseph H. O'Neil, Jr. vs Carrie R. Herreshoff et al.	H E & M
49174 Cram-Y	Walter L. Clarke. C. T. vs Geo. H. McFadden & Bro.	C & H
51713 E McCarthy	Harry Carp vs Charles Fierstein	C & C

FRIDAY, JANUARY 20, 1922

48985 W S Flynn	Walter J. McIsaac vs R. I. Shellfish Co.	Barnefield
49077 D A Colton	Michael J. Cassidy vs J. Samuel & Bro.	W A Gunning
49078 D A Colton	Margaret Cassidy vs J. Samuels & Bro.	W A Gunning
36956 J Collins	James Edward Cameron vs Rhode Island Co.	Whipple-S
49343 J C K-J B L	Cosby H. Dawson vs Rhode Island Co.	Whipple-S
50632 J L Casey	Rosina D'Andrea vs Guiseppe Leonardo	J Venezia
51427 F & H	Henry F. McCabe vs Joseph Olney	W & W
51428 F & H	Henry F. McCabe vs Joseph Olney	W & W
46443 W & G	City of Providence vs Dario Bacchrocchi	P & DeP
50396 E H McC-C	Rocco DiNezza vs Antonio Gerardi	T H Holton
44708 C & C	Antonette Tascia vs Angelo Simone	P & DeP
49967 Capotosto-J	Frederico Curzio vs Luigi Martinelli	P & DeP

SUPERIOR COURT

Peter Reynolds	}	W.C.A.No.280
vs		
Blackstone Valley		
Gas & Elec. Co.		

January 5, 1922

RESCRIPT

TANNER, P. J. This is a petition for compensation for an injury sustained under the Workmen's Compensation Act.

The burden is upon the petitioner to prove the injury. In view of the various contradictory statements made by the petitioner, as testified to by respondent's witnesses, we do not feel that the petitioner has sustained the burden of proof and must therefore find that he did not sustain the injury claimed.

The same burden rests upon the petitioner as to proof of notice of injury. No written notice was given and petitioner relies upon knowledge of the injury on the part of the respondent. Every officer of the company denies having received any notice of the injury, except the bookkeeper. We doubt if the bookkeeper is such an agent of the company as could charge the company with knowledge through notice to him.

Eydman vs Premier Accumulative Co., Ltd. (1915).

W. C. Insurance Reports, 82.

We must therefore find that the knowledge of the company does not dispense with written notice, which was not given.

Petition denied.

For Petitioner: J. R. Higgins.

For Respondent: J. H. Rickard.

Looks Like Baker And Capotosto For the Judgeships

Reports which are regarded as reliable indicate that unless there is a radical change in the programme within the next week the probability is that Assistant Attorney General A. A. Capotosto and Judge Hugh B. Baker of Newport will be the two judges elected to the Superior Court bench at the present session of the Legislature.

It is understood that the Capotosto and the Baker factions will not go into caucus on the judgeships till after the bill creating the additional member of the court is reported. Then they will get together, according to reports, and agree on the nomination of Messrs. Capotosto and Baker.

Isaac Gill, the Pawtucket chieftain, is out for the election of City Solicitor E. J. Daignault of Woonsocket, it is stated, and unless he succeeds in putting Mr. Daignault over his influence in the organization is likely to suffer. The French societies have been exerting tremendous efforts to get their candidate elected, it is said, and Mr. Gill chose not to ignore the pleas of so big an element in the constituency of the Blackstone Valley.

It is no secret that there was a meeting of the "Big Six" recently with reference to the judgeship. It is stated that they tentatively agreed on Mr. Daiganult and Judge Baker. But since then things have happened which are likely to upset that plan. Judge Harris, one of the "Big Six," was not present at the meeting. Whether he would favor Daignault and Baker is unknown, but the friends of Assistant Attorney General Capotosto got busy and it is reported that they are confident that the slate will be Messrs. Capotosto and Baker.

Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 15

JANUARY 13, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

MONDAY, JANUARY 16, 1922

Eq 527 G M & H P & S	William E. Loutet vs Alanson Alexander et al.	M & M
Ex5448 J J M P & D	A. H. Burns, Sr., et al. vs Wm. Brightman, et al.	W & G

WEDNESDAY, JANUARY 18, 1922

Eq 525 W A G P R	Maria F. Ciaccia vs General Fire Ex. Co.	R T B
Ex5496 C W H E E	Frank H. Swan et al., Receivers vs Pelletier Tr. Co.	T P C

FRIDAY, JANUARY 20, 1922

Ex5465 W J B	Crystal Spring Co. vs Carrie Cornell	G E & C
Ex5532 J P B	J. E. Nichols vs Henry W. Mason & Co.	W & G
Ex 534 W R P	Laura I. Creaser vs Laura J. Thatcher	D E G

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JANUARY 16, 1922

P.A.794 C & C E & A	Lansing Lumber Co. vs City of Providence	E S C
Eq5502G E & C	I. N. Burns et al. vs Richard Connery	W & G
Eq5549 Q & K	August Johnson vs Sarah J. McDonald	A Goman
W.C.A.271 Ven'z'le	Luigi Lupoli vs Atlantic Tubing Co.	W A G
Eq5679 West	U. Gray vs United Electric Ry. Co.	Sweeney
Eq4628 A V P	G. Pestina et al. vs Orazio Tafuro	Troy
Eq5611 Easton	A. I. Remington vs Edward A. White	
52125 Q & K	Bertha A. Whiting vs Providence Gas Co.	S K & S
52126 Q & K	H. S. Whiting vs Providence Gas Co.	S K & S
Eq5684 B & B	S. Klein vs C. S. Cunningham & Sons	
Eq5669 Easton ,	Margaret Boffi vs Anthony Allanesse	
Eq5686 Cosgrove	A. M. Grudzruski vs Walter C. Carpenter et al.	

TUESDAY, JANUARY 17, 1922

49359 Easton	Arthur Jones vs J. F. Jackson	F H W
Eq5658 West	Rush Sturgess vs T. R. Sturgess et al.	
Eq5341 G H & A	B. W. Weinbaum vs Trinity Sq. Jewelers, Inc., et al.	
Eq5687 W & W	Charles E. Doe vs Doe & Co., Inc.	
51256 P Romano	Antonio Ronaldi vs T. J. Tierney	A G C
Eq5650 J R H	Felix La Rose et al. vs Archie Plante et al.	
Eq5660 West	B. W. Weinbaum vs J. M. Weinbaum	
Q & McK	Patrick Hurley vs George Saxon	
51616 McG & S	Jacob Ernstof vs Nut Grove Butter Co.	W C & C
Eq5102 S & S	William Connole vs Clara Connole et al.	Cooney & C

WEDNESDAY, JANUARY 18, 1922

Newport S K & S	Dexter Aldrich et al. vs S. K. Brownell	C C R
Eq5646 Joslin	Walter S. Davis vs Adda Amusement Co.	
43927 Chaffee	G. E. Mathewson vs T. K. Fisher	R & R
Eq5627 Q & McK	J. L. O'Rourke vs Luke P. Walsh	W S F

Jury Trial Calendar

MONDAY, JANUARY 23, 1922

34173 J E B-F & M	George Kirk vs Turner Ball et al.	Knauer
48792 P & DeP	Samuel Bova, p. a. vs Dorithe Brandel	Collins
50333 B & B	Simon S. Kraus vs Max Ross et al.	R & R
P.A.782 W & W	Joseph Richardson vs State Board of Pub. Roads	
50668 Cannon	Joseph Lowe vs Leonard R. Curtis	Brown
50394 McGauley	Bella M. Saarez vs Joseph Renzo	P & DeP
49118 F & H	Santo Lombardi vs Webster Knight	M D C
51396 W C & C	Annie D. Nelson vs J. Samuels & Bro., Inc.	W Gunning
51397 W C & C	James S. Nelson vs J. Samuels & Bro., Inc.	W Gunning
51451 J A Enos	Manuel Nunes vs Frank C. Fuller	Ziegler
45044 Stiness-M-B	Pat. Vul. Roofing Co. vs Thomas H. Early Co.	C & B-G

TUESDAY, JANUARY 24, 1922

44186 J J Nolan	Frank Malcom vs Jessie P. Darling	J A Murphy, Jr
		T J Dorney
		G J Sheehan
47588 G H R	New Acme Plating Co. vs Keacot Mfg. Co., Inc.	L B & McC
49191 R & R-A	Morris Bazar vs Walter W. Massie	Gunning
50954 M & T	Am. Cotton Oil Co. vs Nar. Dairy Company	W C & C
50677 Com & Can	Security State Bank vs Thomas F. Randail	W & W
50733 H E & M	White, Wile & Warner vs H. E. Goodman	B & B
47846 Barnefield	Lawrence F. Vorier vs Ernest Charpentier	G Breaden
48298 G Breaden	Ernest Charpentier vs Lawrence F. Verier	Barnefield
50627 F & H	Chas. W. Gustavson, Jr. p. a. vs Alexander Mackay	W & G
49144 E C S	J. A. Hackett & Co. vs Eastern Broom Co.	Wildes
51425 Stiness-M	Providence Buick Co., Inc. vs George Lee	G M & H
51456 C & Cooney	Patrick Harrington vs United Ry Signal Co.	C & Hart
51474 Bennett	Maurice Levison vs Nicholas Bernadinelli	C & O'C
51768 R & R	Hope Burlap Co. vs Sheridan & Danekar	

WEDNESDAY, JANUARY 25, 1922

48343 N Hilfer	Samuel Kelman vs Cady Moving Storage Co.	G M & H
50236 J A Enos	Marian G. Souza vs Serafenni Silva	Q & McK
38809 P & DeP	Sarah Stuckey vs Rhode Island Company	Sweeney
38810 P & DeP	Albert Stuckey vs Rhode Island Company	Sweeney
49860 W Gunning	Jas. J. McKittrick vs George H. Bates	P & DeP
50144 Carty	Patrick McVay vs Walter L. Kelley	Bannon
51198 J F Harlow	Antonio S. Mendes vs Andrew Scotti	Prescott

49978 L B & McC	Roberts & Oak, Inc. vs Martin & Cooke	S K & S
47151 P Lapham	William S. White vs King Braiding Machine Co.	W McSoley
51548 R & R	Irene I. Miller vs George T. Lousen	F J Berth

THURSDAY, JANUARY 26, 1922

49336 G H & A	A. H. Dondero vs Standard Emblem Co.	F & H
50336 R & R	Mary Moniz vs James Amato	E M S-S
50793 Ziegler-K	Arthur E. Parker vs Dorsital Mailloux	Q & K
50754 B & B	David F. Gilbert & Co., Inc. vs Guisepe Peluso	Veneziale
51010 Hicks	Charles H. Whipple vs Stephenson Mason	Higgins
51016 Higgins	Stephenson Mason vs Charles H. Whipple	Hicks
51119 Stiness-M-B	Granville S. Standish vs Army & Navy Sales	Bromson
51525 H Andrews	James Hargreaves et al. vs John W. Yeomans	C & H
48351 F & H	Emma V. Allen vs Albert A. Kenyon	W & G-B
51776 P C J	Frank B. Austin vs Daniel Noonan	
49886 C & C	John J. Fitzgerald vs Joseph Mullen	F & M

FRIDAY, JANUARY 27, 1922

48313 M & F	James D. Whitaker vs R. C. N. Mfg. Co.	Corcoran
51215 J P Brennan	City of Providence vs Harg Tapalian	T J Dorney
50482 Johnson	Hawkins Lumber Co. vs Angelo Del Santo	McSoley
50649 Coen	James Hughes vs Arthur Blum et al.	Joslin
50961 H E & M	Addie A. Fenner vs W. A. Fenner	R Grieve
51204 Stiness-M	Indiana M. & F. Co. vs. N. E. Picture Frame Co.	R & R
51452 F & H	William H. Grady et ux. vs Charles Adams	A B West
51453 F & H	William H. Grady et ux. vs James Yager	F J Berth
49645 W & G	Stella J. Brooks vs Aetna Life Ins. Co.	G H & A
49905 P J Quinn	Amelia G. Santos vs Manuel Brito	J Ousley

SUPREME COURT

G. W. McNear, Inc.

vs.

American & British
Mfg. Co.

Ex. &c. No. 5492

January 6, 1922

OPINION

Before Brown, J., Below)

SWEETLAND, C. J. This is an action of the case in assumpsit to recover damages for the alleged breach by the defendant of two written agreements.

The case was tried in the Superior Court before Mr. Justice Brown sitting with a jury and resulted in a verdict for the plaintiff in the sum of \$138,433.63. The defendant duly filed its motion for a new trial which was denied by said justice. The case is before us upon the defendant's exception to the decision denying its motion for new trial, and upon the following exceptions taken by

the defendant in the course of the trial upon which it now relies.

The case has been in this court before upon a bill of exceptions following a previous trial in the Superior Court and in our opinion filed at that time the essential facts are set forth (42 R. I. 302). The evidence in the trial now in review is substantially the same as that presented at the previous trial. By reference to the transcript the following facts appear: Quick silver, used in making fulminate of mercury, is an essential ingredient in the manufacture of ammunition employed in modern warfare. During the World War there was a shortage of that substance. In 1916 the plaintiff, doing business in California, as agent of the defendant, entered into two written contracts with one Murray Innes for the purchase of a large quantity of quick silver; and in its own name the plaintiff became bound for the performance of said contracts. By two written agreements, purporting to be of

even date respectively with said contracts between the plaintiff and Innes, the plaintiff assigned said contracts to the defendant, which assumed all the obligations therein imposed upon the plaintiff. Said Murray Innes, however, did not assent to these assignments and in no way released the plaintiff from its obligations under the contracts with him. When, in accordance with his undertaking, Innes delivered said quick silver to the plaintiff the defendant refused to accept or pay for it or any part of it. The plaintiff was then obliged to pay for the quick silver in accordance with the terms of its contract with Innes and then sold the same at public auction, upon a falling market, at a loss. That loss, with interest, the plaintiff in this suit is seeking to recover as damages for the defendant's breach of its agreements to assume the plaintiff's obligations under its contracts with Innes.

At the conclusion of the evidence the defendant moved that the justice direct a verdict in its favor for the reason, that in the state of the evidence upon the issues raised by three of its defenses it was entitled to a verdict as matter of law. The first of these defenses was that the agreements in suit were not binding upon the defendant because it had failed to furnish to the plaintiff a written guaranty of its performance of its agreements. The second was that the plaintiff had not acted in good faith toward the defendant in its dealings with said Innes leading up to said contracts and the agreements in suit. The third was that the agreements were invalid because in furtherance of a conspiracy between the plaintiff and defendant. The justice denied defendant's motion for the direction of a verdict and the defendant excepted to such action of the justice. This exception should be overruled. There is no merit

in the defendant's claim that it was not bound by said agreements because it did not procure guarantors in writing of the defendant's due performance of its obligation under the agreements. Upon the face of these agreements the obligations of the parties are in no degree conditioned upon the furnishing of such guarantors. Such guarantors if furnished would be solely for the benefit and security of the plaintiff and if the plaintiff waived such a condition in its favor, accepting the agreements without guarantors and acted in reliance upon the defendant's sole undertaking the defendant can not now be permitted to escape liability because of such waivers on the part of the plaintiff. The contention of the defendant is that the plaintiff should not be permitted to recover in this action because of its lack of good faith towards the defendant in the transactions which it carried on as the defendant's agent. Particularly it is claimed that in making the contracts in its own name for the purchase of the quick silver in question it received from Innes a concession or rebate from the price named in the contracts. In our former opinion we held that in the record of the previous trial the claim of bad faith was unsupported, because by the uncontradicted evidence full disclosure regarding such rebates was made by the plaintiff's agent to the defendant's agent and acquiesced in by him before said contracts and the assignments of them to the defendant were made. At the last trial the testimony of the plaintiff in regard to such disclosure was contradicted by the testimony of Joseph H. Hoadley. It thus became a question properly to be submitted to the jury as to whether such disclosure was made to the defendant before it entered into the agreements in suit. The main issue before the jury was as to whether the agreements sued upon were made

pursuant to a conspiracy on the part of the plaintiff and the defendant to obtain a monopoly of quick silver for the purpose of selling it at an artificially advanced and unreasonably high price in violation of the common law, the statutes of California, in which State the contracts were to be performed, and the act of Congress, known as the Sherman Act. If such conspiracy existed the agreements upon which the plaintiff now seeks to hold the defendant in this suit clearly were made in furtherance of it and are not enforceable. The facts and circumstances in evidence relating to the dealings between the parties bearing upon the issue of conspiracy were properly submitted to the jury. Upon that evidence a finding would be warranted that the plaintiff was ignorant of any illegal purpose on the part of the defendant or its agent and that the plaintiff in good faith acted as agent for the defendant who, it believed, had a legitimate purpose in desiring to purchase the quick silver in question.

After a verdict in favor of the plaintiff upon these issues we will not overrule the decision of said justice refusing to set such verdict aside.

The defendant offered the testimony of certain witnesses as to statements, which they had heard the defendant's agent, Joseph H. Hoadley, make in the course of what the defendant claims were telephonic conversations between said Hoadley in New York and John W. McNear in San Francisco. The justice allowed such testimony to be introduced in each instance where there appeared to him to be sufficient evidence of the identity of John W. McNear as the other party to the conversation, and excluded the testimony in the absence of such evidence. The defendant excepted to the court's rulings excluding the testimony. These exceptions are not well taken. The distinction made by

said justice regarding the admissibility of evidence as to statements purporting to be made in conversation through the medium of the telephone was without error, and his ruling as to the insufficiency of the evidence to establish the identity of John W. McNear as the other party in such alleged conversation was justified in each instance.

In the deposition of the witness, Young, the Justice permitted the introduction of testimony as to certain statements which the witness heard Joseph H. Hoadley make in a telephonic conversation with John W. McNear and excluded testimony as to other statements which the witness said "impressed me in the conversation." Said Justice excluded the latter testimony on the ground that the witness was testifying as to impressions rather than as to his memory, and the defendant excepted. From an examination of the context it appears that the witness was endeavoring to indicate that the statements of Hoadley, which the Justice excluded, were particularly impressed upon his memory. However the ruling of said Justice in this matter, if erroneous, should not be regarded as constituting reversible error because said justice permitted such excluded statements, appearing in a subsequent portion of the depositions, to be presented to the jury.

A large number of the defendant's exceptions are to rulings of said justice excluding the testimony of various witnesses as to acts done and declarations made by Joseph H. Hoadley in New York in regard to the sale of quick silver in 1916, as to his purpose to secure a monopoly in quick silver at that time, and as to his expectation of great profit from such monopoly. None of this proffered testimony related to matters in which any agent of the plaintiff participated or at which he was present. The

contention of the defendant is that as it had presented sufficient evidence to require the submission to the jury of the issue of conspiracy between the parties, it must be held that the defendant had presented *prima facie* evidence of such illegal combination, and thereafter every act and declaration of each conspirator in pursuance of the concerted plan should be regarded in law as the act and declaration of both and as furnishing original evidence against each of them. (*Dodge vs Goodell*, 16, R. I. 48). That generally recognized principle of law is without application here. This case is distinguished from one in which a third party seeks to fix upon two or more alleged conspirators liability for an illegal combination. It is then incumbent upon such third party to establish both the combination and its illegal purpose, and having first shown a concert of design and action between the alleged conspirators he may then show, as again them all, the illegal purpose of such combination by showing the acts and the statements of each in furtherance of the combination, and may hold each responsible for the acts of the others. In the case at bar there is no question but that the plaintiff, acting through its agent, John W. McNear, undertook to secure for the defendant, acting through its agent, Joseph H. Hoadley, a large part of the quick silver production in the State of California for the year 1916. There can be no question that the purpose of Joseph H. Hoadley, acting for the defendant, was to obtain a monopoly of quick silver for the purpose of selling it at an artificially advanced and unreasonably high price. The main issue and practically the sole controversy between the parties in the case is as to whether the plaintiff, acting through its agent, knew of the ulterior purpose of the defendant and illegally combined with it to carry

out such purpose, or whether the plaintiff, as it claims, was in this matter merely pursuing its ordinary business as a commission broker and was endeavoring to secure quick silver for its principal, the defendant, entirely without participation in the design of the defendant and without knowledge that it desired to secure said quick silver for other than a legitimate purpose. The evidence which the defendant sought to introduce with regard to the acts and statements of Hoadley in New York was in corroboration of the admitted designs of Hoadley and the defendant, but in no way tended to support the defendant's contention of an illegal combination with the plaintiff in California to further such designs and to share in their anticipated profits. Such testimony was irrelevant and inadmissible. The occasional reference to John W. McNear and the plaintiff contained in the declarations of Hoadley, which the defendant sought to introduce, with one exception, are entirely consistent with the plaintiff's contention that it was acting as the agent of the defendant without knowledge of the defendant's purpose. The sole reference to a combination contained in the defendant's offers of proof of the declaration of Hoadley is in its offer of proof through the deposition of the witness, Young, that Hoadley in the course of a conversation with Young said with reference to McNear that "they would divide fifty-fifty." This declaration of Hoadley would be inadmissible under the rule of evidence which the defendant invokes for it could not be considered as made in furtherance of the common design of the plaintiff and defendant, if one had been established, nor as a part of the *res gestae* of any act done in furtherance of such design. In the circumstances of the case, as presented by the evidence in the transcript, a finding that the plaintiff combined with the

defendant in its design to create a monopoly in quicksilver, if warranted at all, must be based upon the evidence as to the transactions and communications between the parties acting through their agent and upon the reasonable inference to be drawn therefrom, and in no degree would a finding of conspiracy be supported by any amount of evidence as to the acts and declaration of the defendant's agent in New York of which the plaintiff was ignorant. Furthermore, we are of the opinion that in any view as to the bearing of the acts and declarations of Hoadley upon the main issue the determination as to the admissibility of evidence as to such acts and declarations rested in the discretion of the justice. If there was evidence in the case from which a jury might possible draw the inference that a conspiracy existed between the parties, the Justice under our practice would be obliged to submit the question to the jury, even though such inference would not be drawn by him, and although he might feel that a verdict finding a conspiracy would be against the preponderance of the evidence and should be set aside by him. We are of the opinion that in the state of the proof said justice might properly exercise his discretion and exclude this testimony, although under our practice he felt constrained to submit the question of conspiracy to the determination of the jury.

The defendant's exceptions taken to rulings of the court, excluding certain questions propounded to the plaintiff's witness, McNear, in cross-examination, are not sustained. These questions do not have a direct bearing upon any issue in the case. Their purpose is to test or to discredit the sincerity of the witness. Some appear to have been asked in irony. In excluding these questions the justice did not abuse his discretion

to regulate and restrain cross-examination of this character.

The defendant excepted to the rulings of said Justice admitting evidence as to the amounts received by the plaintiff at sales of quick silver delivered to it by Innes under said contracts subsequent to the defendant's breach of its agreements with the plaintiff. This evidence was admitted for the purpose of measuring the plaintiff's damages. The evidence in the case warranted a finding that the plaintiff entered into the two contracts with Innes merely as agent of the defendant and for the defendant's benefit. By the first of these contracts the plaintiff obligated itself to receive from Innes and to pay him for forty flasks of quick silver per month for six months from February, 1916. By the second contract the plaintiff obligated itself to purchase a stipulated portion of the full product of the "Oceanic Quick Silver Mine" for six months from February 9, 1916, which portion of the production of said mine was estimated as from seventy-five to eighty flasks per month. The plaintiff assigned these contracts to the defendant, but there was no novation, and the plaintiff continued bound upon its contracts with Innes. By its default and by its statements to the plaintiff the defendant clearly repudiated its obligations under said agreements of assignment. By the weight of authority in this country and in England the plaintiff was then entitled, if it saw fit, to treat such renunciation on the defendant's part as a breach of the entire agreement, and to commence this action on June 6, 1916, before the termination of the period within which the full deliveries of quick silver were to be made. If the jury found that the defendant was liable, in measuring the amount of the plaintiff's damages the jury should consider not only the plaintiff's loss upon the quick

silver, which it was obliged to receive before the defendant's breach of said contracts and before the commencement of this suit, but also the plaintiff's loss in respect to quick silver delivered under said contracts subsequent to the date of the writ. The plaintiff was not a dealer in quick silver in the ordinary sense, and the defendant was not a purchaser from the plaintiff. Quick silver was a commodity which had no value to the plaintiff for its own use. To reduce the amount of its loss, and to mitigate the damages to be assessed against the defendant, the plaintiff, with due diligence and after proper notice, sold the quick silver from time to time at public auction. The defendant's exceptions to the admission of evidence as to the amounts received at such sales, to assist in fixing the plaintiff's damages, are without merit. Such evidence is in effect in mitigation of damages. In the leading case of *Hochster vs De la Tour*, 2 El. & Bl. 678, Lord Campbell said in regard to the measure of damages in a suit brought before the time fixed for the termination of an executory contract on account of an anticipatory breach of such contract, "The jury in assessing the damages would be justified in looking to all that had happened or was likely to happen to increase or mitigate the loss of the plaintiff down to the day of trial." In *Frost vs Knight*, L. R. 7 Ex. III, the court said with reference to damages for the anticipatory breach of a contract to be performed at a future time, that the plaintiff, "will be entitled to such damage as would have arisen from the non-performance of the contract at the appointed time subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." *Roehm vs. Horst*, 178 U. S. 1, was an action to recover damage for the breach of four executory con-

tracts. At the date of the action the time to commence performance of the first contract had arrived and performance by the plaintiff had been tendered and refused. As to the other three contracts, the time for performance had not arrived. The court held that the action might be maintained for the breach of the four contracts, and with reference to damages said: "As to the question of damages, if the action is not premature, the rule is applicable that plaintiff is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement by reason of circumstances of which he ought reasonably to have availed himself."

The defendant claimed that, after it had executed the agreements to assume the plaintiff's obligations upon the contracts with Innes, it intrusted such executed agreements to its agent, Hoadley, with explicit direction not to deliver them to the plaintiff until after Hoadley had secured options for the purchase of the rest of the California quick silver production of 1916, which the defendant desired to obtain, and that in disregard of this instruction, Hoadley delivered the agreements to the plaintiff before said condition was fulfilled. The Justice instructed the jury that this defence was not tenable and that they need give that matter no consideration. The defendant excepted. In this instruction we do not find reversible error. What the defendant cites to us from the evidence as proof that this alleged direction of the defendant to Hoadley came to the plaintiff's knowledge before and at the time of the delivery of these executed agreements amounts to no more than a scintilla as opposed to the plaintiff's denial and the overwhelming preponderance furnished by the cor-

respondence and the circumstances in the case. At the defendant's solicitation and for its benefit the plaintiff had unconditionally placed itself under heavy liability to Innes, with the understanding that the defendant should assume such liability. The defendant's agent delivered to the plaintiff with the executed agreements a certified copy of a resolution of the defendant's board of directors. This resolution was as follows: "Resolved, That the Chairman of the Board is hereby authorized and empowered to sign contracts with George W. McNear, incorporated, dated January 28th and February 9th, 1916, and furnish said company with a certified copy of this resolution." The circumstances surrounding the transaction would justify the plaintiff in acting in reliance upon the terms of the agreements formerly executed by the responsible officers of the defendant corporation, sealed with its corporate seal and delivered by its apparently fully authorized agent. In the face of these circumstances we should not be warranted in setting the verdict aside solely because this question which the defendant raised was not submitted to the jury.

The defendant excepted to the refusal of said justice to submit certain questions to the jury for special findings. These questions are as follows: "1. Was Mr. Hoadley endeavoring in January and February, 1916, to get control of a sufficient quantity of quick silver to enable him to raise the price of quick silver? 2. Was John A. McNear working with Joseph H. Hoaley to enable Mr. Hoadley or the defendant to get control of a sufficient amount of quick silver to raise the price of quick silver? 3. Was Mr. Hoadley endeavoring in January and February, 1916, to get control of a sufficient quantity of quick silver to enable him to artificially raise the price of quick silver? 4. Was

Mr. John A. McNear working with Joseph H. Hoadley to enable Mr. Hoadley or the defendant to get control of a sufficient quantity of quick silver to enable him to artificially raise the price of quick silver?" The defendant bases its right to have these questions submitted upon the following provision of Section 6, Chapter 291, General Laws, 1909: "In any case the court may and upon request of either party shall direct the jury to return a special verdict upon any issue submitted to the jury." This statutory provision relates to the submission for special finding of a question involving some material issue in a case and not to the submission of what is merely a controverted point in evidence. One of the material issues in this case, and as the case was tried almost the sole issue, was whether the plaintiff and defendant in the transaction, of which the agreements in suit were a part, had combined to obtain a monopoly of quick silver with the unlawful intent of selling the same at an unreasonably high price. A request for a special finding upon a question which should embody that issue would be within the terms of the statute. In refusing to submit the question presented by the defendant said justice intimated his willingness to submit a question which should call for a finding upon the material issue which we have stated. It is true, as the defendant points out, that said Justice in his charge instructed the jury that the "plaintiff is bound by the acts, purposes, intent and knowledge of John A. McNear, who was acting for it, and the defendant is bound by the acts, purposes, intent and knowledge of Joseph H. Hoadley, who was acting for it." This instruction is a reasonable interpretation of the evidence. It was not excepted to by either party and must be taken as the law of the case. The defendant claims that in the light of that

instruction the questions presented by it for submission to the jury do as a whole fairly present the material issue to which we have referred. The Justice properly required that the questions submitted should plainly call for a finding as to whether the plaintiff and defendant, acting through their respective agents, were working together in furtherance of a common unlawful design. That was all for which the defendant could properly ask under the statute. If, however, there should be conceded to the defendant the interpretation which it now places upon the language of these questions, the defendant has not been prejudiced by the refusal of the justice to submit them for special findings, for the issue which we have stated was the particular matter in controversy between the parties in the long trial before the jury. It formed the subject of a large part of the arguments of counsel. It was clearly and at length explained and submitted to the jury by said justice in his charge and they were instructed by him that the matter of the conspiracy "is the principal defence and to that you will devote your careful consideration." The questions offered for submission must have been intentionally answered adversely to the defendant in the general verdict.

The defendant insists upon its exception to the action of said justice in charging the jury in accordance with the plaintiff's ninth, tenth, eleventh and twelfth requests to charge. These requests are as follows: "9. If the defendant relies upon a conspiracy it must show such conspiracy to have been between the McNear Company and the American & British Company. It is not sufficient to show that Hoadley alone may have been engaged in such enterprise to obtain or raise the price of quick silver. 10. There is no evidence in the case that the defendant corpora-

tion authorized Hoadley to sell or dispose in any way of the quick silver obtained under the contracts in suit. 11. The evidence is uncontradicted that Hoadley was not an officer, agent or employee of the defendant corporation and unless he was given authority by some action of the defendant his conduct in disposing of quick silver would not be ley was not an officer or employee or ley was not an officer oremployee or agent of the American & British Company and that company cannot plead any unlawful acts of his as a defence to the action unless it proved that what he did or attempted to do in dealing with quick silver purchased by the contracts of January 28th and February 9th was done by its authority (or that such acts were subsequently ratified)." These instructions in so far as they purport to set forth legal principles are correct statement of law. In their application to the facts of this case they should be considered in connection with the explicit instructions of said Justice contained in his general charge, i. e., that a conspiracy may be proved by inferential and circumstantial evidence, although there is an absence of positive evidence and that in the determination of the issue of conspiracy the jury should take into consideration the communication between the parties and all proper and legitimate inference to be drawn from them, and also his instruction that in this transaction the plaintiff is bound by the acts, purposes, intent and knowledge of John A. McNear and the defendant by the acts, purposes and intent of Joseph H. Hoadley. In so far as these requests to charge state conclusions of fact from the evidence they are warranted. There was no evidence in the case of a special authorization from the defendant to Hoadley to sell any of the quick silver obtained under the contracts in suit. It was uncontradicted

that Hoadley was not an officer of the defendant and there is no positive evidence that he was an agent or employee of the defendant for the purpose of disposing of quick silver, although an inference of such agency or employment would not be unwarranted from the evidence and it is plain that Hoadley was the defendant's agent in arranging for the purchase of quick silver in California. All acts looking toward the disposition of quick silver by Hoadley or by the defendant took place in New York and in these neither the plaintiff or its agent took part nor is there any evidence that the plaintiff or its agent had knowledge of such acts, save as such knowledge might be inferred from the correspondence between the parties, which correspondence was placed before the jury. In line with what we have already said in this opinion, the conduct of Hoadley with reference to the disposition of quick silver in New York is not material to the issue before the jury, whether such quick silver was his own or was that which the defendant was to obtain under said contracts with Innes, and whether Hoadley's conduct in that regard was or was not authorized by the defendant. Such conduct tends to support the defendant's claim as to its own and Hoadley's design in attempting to acquire a control of quick silver, regarding which claims there is no dispute in the evidence, but it does not tend to support the defendant's claim of an illegal combination with the plaintiff in California in furtherance to such design.

There is no merit in the defendant's so-called exception to what it claims was the misconduct of plaintiff's counsel in his argument to the jury. We have frequently had occasion to say that the office of a bill of exceptions under the statute is solely to bring before us for review rulings of the Superior Court to

which exceptions have been duly taken. Such bill of exceptions may not include other matters, as in this instance objections to the conduct of counsel. If in any case a party considers that he has suffered prejudice through the conduct of a jurymen, a witness or an opposing counsel or in respect to any other matter, arising in the trial of the cause, other than the action of the court itself, such party should first ask the court for some appropriate action on its part to relieve him from the effect of such harmful matter. If the court fails to grant him the relief to which he considers himself entitled then by exception duly taken to the court's action he may bring the court's ruling before us for review.

All the defendant's exceptions are overruled. The case is remitted to the Superior Court for the entry of judgment on the verdict.

For Plaintiff: Charles F. Choate, Jr., Archibald MacLeish, Frank T. Easton, Greenough, Easton & Cross.

For Defendant: Waterman & Greenlaw.

SUPREME COURT

Morris F. Conant

vs.

Furnace Improvement
Company

Ex. &c. No. 5452

OPINION

January 6, 1922

(Before Blodgett, J., Below)

RATHBUN, J. The declaration in this case contains a single count in indebitatus assumpsit. The case is before this court on the defendant's exception to the action of trial justice in the Superior Court in directing a verdict for the plaintiff.

The plaintiff was a representative of the Pilgrim Machine Company, a cor-

poration operating a machine shop. While soliciting business for his company the plaintiff met the officers of the defendant company, a corporation organized for the purpose of manufacturing and selling a patented article called a combustion in furnaces attached to steam boilers. The latter corporation was in need of capital and also of the services of a machine shop to manufacture said patented article. It appears that the plaintiff could secure for his company the work of manufacturing combustionizers for the defendant company provided the plaintiff or his company invested \$2500 in the preferred stock of the defendant company. The plaintiff in accordance with some agreement between himself and defendant mailed to the defendant a check for \$500. No letter accompanied the check. The defendant's treasurer on receipt of said check mailed to the plaintiff a receipt, stating that \$500 had been received on account of a subscription of \$2500 for preferred stock of the defendant company. Upon receiving said receipt, the plaintiff wrote the defendant as follows:

"Dear Mr. Casey:—

I am in receipt of yours of the 1st constituting a receipt for my check. My understanding with Mr. Shedd and Mr. Puddington was that my deposit of \$500 was to be simply evidence of good faith on my part until the Pilgrim Machine Co. could manufacture six or a dozen machines and see if the job was satisfactory to Mr. Puddington and the question of price satisfactory to us both. After we had manufactured the sample lot of machines if our work is satisfactory and the price is agreed upon by both of us I was to subscribe to \$2500 of preferred stock. If there was any dissatisfaction with our class of workmanship from your standpoint or we found some detail of manufacture that would make the machine impractical for us to make, I was to have the privilege of deciding whether I would make an investment in your

company or whether I would request payment of the sum of my deposit.

In view of the fact that your receipt reads quite differently from the above I would appreciate confirmation of this understanding with Mr. Shedd and Mr. Puddington.

Sincerely yours,

MORRIS F. CONANT."

The officers of the defendant company testified that, as an inducement to the plaintiff to agree to subscribe for 25 shares of preferred stock of the defendant company, at \$100 per share, they offered to give the plaintiff's company a contract to manufacture all combustionizers sold by the defendant for a period of one year; that the price to be paid was to be the cost of manufacturing plus a reasonable profit; that the plaintiff was to determine the actual price to be paid (i. e. cost plus a reasonable profit) after manufacturing six combustionizers; that the plaintiff accepted this offer on the condition that he found that his company had the ability to manufacture the combustionizers; that the plaintiff reported that his company could build the combustionizers and paid \$500, which he is now seeking to recover, as a part payment for said stock in accordance with his agreement, and that later the plaintiff refused to pay the balance of \$2000 for said 25 shares of stock and also failed to manufacture any of the sample combustionizers.

The plaintiff testified substantially in accordance with his contentions as set forth in his letter in which he objected to the terms of said receipt for \$500. He also testified that the defendant's officers, after the dispute arose concerning the terms of said receipt, promised to repay \$500 to the plaintiff. Each of the defendant's officers denied that he had promised to return money to the plaintiff.

A reading of the transcript discloses that the evidence presented the following issues of fact: Did the parties enter into an agreement whereby the plaintiff agreed unconditionally to invest \$2500 in the preferred stock of the defendant company and did plaintiff send check for \$500 as a part payment for stock in accordance with such an agreement, or did the plaintiff promise to invest \$2500 in said stock only in the event of his obtaining a contract to manufacture combustionizers, after satisfying himself that his company could do the work, and did the plaintiff make the payment of \$500 as a deposit in evidence of good faith in accordance with an agreement that the money would be returned should the parties fail to enter into an agreement for the manufacture of combustionizers; did the defendant after receiving said check for \$500 promise to repay \$500 to the plaintiff?

The evidence was conflicting upon each of these issues. There was testimony from which the jury might have found that the plaintiff agreed unconditionally to invest \$2500 in the preferred stock of the defendant company and that said check was sent as a part payment in accordance with this agreement; also, that the defendant did not agree to repay \$500 to the plaintiff. Consequently it was error to direct a verdict for the plaintiff. The rule was very clearly stated by Mr. Justice Sweetland in *Reddington vs. Getchell*, 40 R. I. at 468, as follows: "The question, however, as to the credibility of witnesses is in the first instance for the jury and not for the judge presiding; nor is the justice warranted in directing a verdict in accordance with what he thinks is the preponderance of the evidence. Upon motion for a new trial made by a party who is dissatisfied with the verdict ren-

dered by a jury, a justice who presided at the trial is justified in considering, and it is his duty to consider, the credibility of witnesses and what, in his view, is the preponderance of the evidence; if he believes the verdict to be unjust he should set it aside and grant a new trial; he should not, however, direct a verdict upon such grounds, but only upon the ground that there is no legal evidence which would justify a contrary verdict. Under our constitution and law when the testimony is conflicting the question of the credibility of witnesses and the preponderance of evidence must in the first instance be determined by a jury; as also they must be finally determined by a jury. *Carr vs. American Locomotive Co.*, 31 R. I. 234." See also *Gilbane vs. Lent*, 41 R. I. 462; *Dawley vs. Congdon*, 42 R. I. 64.

The defendant's exception is sustained and the case is remitted to the Superior Court for a new trial.

For Plaintiff: Green, Hinckley & Allen.

For Defendant: McGovern & Slatery.

SUPREME COURT

Herbert C. Lawton

vs.

Newport Industrial Co.

} Ex. &c. No 5500

RESCRIPT

January 6, 1922

(Before Sumner, J., Below)

This is an action in assumpsit to recover for labor and materials furnished in installing two separate heating systems for the defendant.

The declaration alleges that said systems were installed in accordance with

a special agreement entered into by the parties; that the price agreed upon for installing the two systems was \$4823. The declaration contains also the common counts.

The trial of the case in the Superior Court resulted in a verdict for the plaintiff for \$4394.50. The case is before this court on the defendant's exception to the ruling of the trial court denying defendant's motion for a new trial, on defendant's exceptions taken to the admission and exclusion of testimony and on defendant's exception to the refusal of the trial court to construct the jury as requested.

Before the work was commenced the plaintiff prepared specifications and also a written contract, but the contract was never executed. The testimony shows that the parties agreed that Pierce, Butler & Pierce down-draught boilers were to be installed as a part of each system and that the cost price for installing the two systems was \$4823. The unexecuted contract contained the following clause: "This heating system, if installed in accordance with the plans and specifications, will heat building referred to herein to 70 degrees inside temperature when outside temperature is zero."

The house in which the heating systems were installed were in the process of construction when the agreement between the parties was entered into and the chimney in one house, at least, was partially erected. Each chimney was constructed with a flue, 12x12 inches. The plaintiff testified that he told the defendant's agents that the Pierce, Butler & Pierce boilers required a chimney flue 16x16 inches and that the defendant through its agents agree to assume the risk of the flues being too small. The defendant denied that it agreed to assume said risk. The plaintiff admitted that each of the systems as installed

by him failed to produce a proper circulation of steam and that coal would not burn freely under the boilers. The plaintiff contends, however, that the unsatisfactory results were not due to any fault in the system but to lack of draught resulting from the construction by the defendant of inadequate flues and the use of each chimney in connection with a separate system for heating water

The defendant introduced testimony that the plaintiff's work was defective in that some of the lateral steam pipes did not pitch sufficiently toward the boiler. The defendant's experts testified that the systems were not provided with sufficient radiation. Defendant submitted testimony as to the estimated cost of correcting the plaintiff's defective work and also as to the cost of the extra radiation, which has not been installed, but which the defendant contends is necessary to heat the house in question.

Before suit was commenced the defendant ordered the plaintiff to remove the two boilers. The plaintiff refusing to comply with this order, the defendant substituted other boilers of a different type for the boilers installed by plaintiff and stored the latter boilers on the premises.

The primary issue to be considered in this case is, first, whether the failure of the systems to function was due to the chimney flues being of insufficient size, and, second, if the flues were too small, did the defendant agree to assume the risk of flues, 12x12 inches, being inadequate? There was testimony which we think, warranted the jury in finding both of these issues in favor of the plaintiff.

The defendant's first three requests are to the effect that the plaintiff can not recover if he has failed to complete his contract. The declaration contains a quantum meruit count. The testimony shows that the defendant intended to retain and is using all of the two systems excepting the boilers and there was no contention that it would cost the defendant any sum, even, approximating the contract price to make the alterations, including new boilers and extra radiation, which the defendant contends are necessary to produce the systems which the plaintiff agreed to furnish and install. The defendant decided to retain and is enjoying the benefits of labor and materials, furnished by the plaintiff, of a value clearly in excess of any damage which the defendant suggests by evidence that it has suffered by reason of the alleged breach of contract. It is not suggested that the plaintiff did not in good faith endeavor to strictly perform the contract. Under the circumstances the defendant is not entitled to be enriched at the expense of plaintiff even although the plaintiff broke his contract. See 13 Corpus Juris 690.

The fourth request assumes that the issues relative to the size of the chimney flues are not in the case. The justice who presided at the trial has denied the defendant's motion for a new trial and we find no reason for disturbing the verdict of the jury which has the approval of the trial court.

All of defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: Burdick & McLeod,
William A. Peckham.

For Defendant: Max Levy.

SUPREME COURT

John Sears

vs.

A. Bernardo & Sons

} Ex &c. No. 5510

OPINION

January 6, 1922

(Before Sumner, J., Below)

RATHBUN, J. This is an action of trespass on the case for negligence brought to recover for personal injuries suffered by the plaintiff and for damages to his automobile caused by a collision between an automobile owned and operated by the plaintiff and a truck owned by the defendants as co-partners and operated by one of the partners. The trial in the Superior Court resulted in a verdict for the plaintiff for four hundred dollars. The case is before this court on defendants' exceptions: to the admission of testimony; to portions of the charge to the jury; to the refusal to charge to the jury; to the refusal to charge as requested and to the refusal of the trial court to grant a new trial.

The collision occurred at the intersection of College and South Main streets in the city of Providence when the plaintiff's automobile was proceeding in an easterly direction and the defendants' truck in a northerly direction. The portion of South Main street from which the truck emerged immediately before the accident was a one way street and the truck was driven out of South Main street in the direction forbidden by the city ordinance.

The fifteenth exception is to the following instruction to the jury: "It is charged that the defendant was guilty of negligence in that he used a one way street in violation of law. Of course if he violated the ordinance of the city of Providence and used a one way street to that extent, he was guilty of negli-

gence." Whether the defendant was guilty of negligence was a question of fact to be determined by the jury. The fact that the defendants' truck proceeded along a one way street in the direction prohibited by the ordinance is a fact for the jury to consider in connection with all other facts bearing upon the question of whether the defendants were guilty of negligence, but it was error to charge as a matter of law that the violation of the city ordinance constituted negligence. *Oates vs. Union R. R. Co.* 27 R. I. 500. The fifteen exception is sustained.

The defendants took twenty exceptions to the refusal of the court to instruct the jury as requested. It appears that the court adjourned to the following morning immediately after arguments to the jury were concluded and that on the following morning before the court convened the defendants' attorney tendered to the trial justice twenty written requests for instructions to the jury. Said justice, being of the opinion that the rules of the Superior Court require that requests for instructions be presented before arguments are addressed to the jury, refuse dto accept or examine said requests for instructions. The rules of the Superior Court require that requests for instructions be submitted in writing, but said rules do not require that such requests be submitted before arguments are addressed to the jury. It may be appropriate to state that a proper effort to prevent delay in the administration of justice, as well as due courtesy to the court, requires that requests for instructions be presented as soon as

the reasonable convenience of counsel permits. We think it was the duty of said justice to receive and rule upon the defendants' requests for instructions.

Twenty-third exception is to the refusal to instruct the jury in accordance with the seventh request, as follows: "If the plaintiff, while approaching the intersection of the streets where the accident occurred was driving his machine at an unreasonable rate of speed, which speed contributed to the accident, he can not recover even though the defendant was guilty of negligence." The correctness of this proposition can not be denied and the rule is too elementary to require discussion.

The twenty-fourth exception is to the refusal to instruct the jury in accordance with defendants' eighth request, as follows: "Driving a car the wrong way on a one way street does not make the driver liable for all accidents that may occur." The discussion of the fifteenth exception is applicable to this request. It was error to deny the defendants' eighth request.

The twenty-third and twenty-fourth exceptions are sustained.

It appears that at least two of defendants' requests for instruction should have been granted and as said justice did not rule specifically upon each of the defendants' twenty requests for instructions and as we can not infer that he would not have ruled correctly in each instance had he examined said requests we do not consider the exceptions taken to the refusal to charge as requested in the remaining eighteen requests for instructions.

The case is remitted to the Superior Court for a new trial.

For Plaintiff: C. J. Brennan.

For Defendant: E. P. B. Atwood.

SUPREME COURTDomenica M. Bova
et al.

vs.

Antonio Buonanno
et ux.

Equity No. 517

RESCRIPT

January 6, 1922

(Before Tanner, P. J., Below)

This is a bill in equity for an injunction to restrain the respondents from changing the location of an old division fence, and to compel them to remove a few inches of the fire escapes on their building which overhang said division fence. After a hearing upon bill, answer, issues of fact, and oral proof, the presiding justice of the Superior Court found that the division line between the land of the parties was on the line of the division fence, but declined to order the respondents to remove so much of the fire escapes as overhung said fence. A final decree was entered ordering the respondents to refrain from removing said division fence, and to move a new fence they had erected on the land of the complainants to the line fixed by said division fence. The respondents have brought the case to this court upon their claim of appeal from said decree, alleging as grounds therefor that it is against the law and the evidence and the weight thereof.

The respondents claim that the old division fence is on their land almost one foot of its entire length and that they were proceeding to rebuild their half of it on the correct division line when these proceedings were commenced.

The evidence proves that the complainants purchased their land, December 13, 1904, that the fence in question was then standing on the assumed division line, and that it had been there then for more than fifteen years. It

also appeared that soon after the complainants purchased the land they erected a house on it and caused a concrete walk to be laid occupying all the space between their house and said division fence, and that since then they have had the exclusive use and possession of the land covered by said walk. When the respondents purchased the adjoining land, February 13, 1915, the fence was standing and remained so until they attempted to relocate the rear half of it.

There is sufficient evidence in the case to justify the finding that the division line between the land of the parties is the line of the old fence and, under the principle established in the case of *Bloemen vs. Barstow Co.*, 35 R. I. 198 and *Warren vs. Warren*, 33 R. I. 71, this finding will not be disturbed.

The respondents' appeal is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to that court for further proceedings.

For Complainant: Benjamin W. Grim.

For Respondent: B. Cianciarulo.

SUPREME COURT

Thomas M. Morris

vs.

The Texas Company

Ex. &c. No. 5385

RESCRIPT

January 6, 1922

(Before Doran, J., Below)

This is an action of trespass on the case for negligence brought to recover damages resulting to the plaintiff by reason of the destruction of his automobile by fire when plaintiff was being served at a gasoline station owned and operated by the defendant. The trial in the Superior Court resulted in a verdict for the plaintiff for three hundred eighty-five dollars. The case is before this court on defendant's exception to

the refusal of the trial court to direct a verdict for the defendant and also on exception to refusal to instruct the jury as requested.

The first count of the declaration alleges that the defendant while delivering gasoline through a hose into the tank of the plaintiff's automobile negligently permitted the nozzle of said hose to slip from out of the opening in said tank and fall to the ground, thereby causing a spark which ignited the escaping gasoline with the result that said automobile was consumed by fire.

There was testimony that said metal nozzle slipped from out of the opening in said tank and fell striking upon the concrete surface of the ground and that at the same instant a fire blazed up from the gasoline which escaped under the automobile. Of course no one could testify that he saw a spark when the nozzle came in contact with the concrete but we think the jury were justified in concluding from the evidence that the fire originated from spark caused by the nozzle coming in contact with the concrete and that the defendant was negligent in permitting the nozzle to slip from the opening in the tank and strike upon the concrete surface. The defendant's exception to the refusal of the trial court to direct a verdict for the defendant is without merit.

The second and third exceptions are to the refusal to instruct the jury as follows: "1. The defendant is not obliged to explain how this accident occurred or the cause of it. The plaintiff has alleged negligence in certain particulars and if he fails to prove the negligence alleged in the declaration there must be a verdict for the defendant. 2. If there is no evidence that the falling of the hose caused the spark that ignited by falling upon a lamp there must be a verdict for the defendant." The first request was sufficiently cov-

ered by the general charge of the court. The second request if given without explanation would have had a tendency to confuse the jury by leading them to suppose that in order for the plaintiff to recover it was necessary to prove that some one saw a spark produced by the nozzle of the hose coming in contact with the concrete surface of the ground. We have already stated that in our opinion the jury were justified in finding from the evidence that the fire originated from a spark caused by the nozzle coming in contact with the concrete and there was no suggestion that the fire was caused in any other manner.

The court in a brief charge correctly and with sufficient fullness stated the law governing the case. The issue was simple and we can not believe that the jury failed to comprehend their duty.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: Quinn & McKiernan.

For Defendant: Swan, Keeney & Smith, Frederick W. O'Connell.

SUPREME COURT

Isabel R. Jacobs, Admx. }

vs

James A. Gilbert }

Ex. &c. No.5508

January 11, 1922

RESCRIPT

In accordance with the rescript of this court, rendered December 21, 1921, the plaintiff has been given an opportunity to show cause why an order should not be made remitting the cause to the Superior Court with direction to enter judgment for the defendant.

The plaintiff, by her attorney, appeared before the court at the time appointed and argued the case at length, and after due consideration the court is of the opinion that no cause has been shown by the plaintiff why such an order

should not be made. It is ordered that the cause be remitted to the Superior Court with direction to enter judgment for the defendant.

For Plaintiff: J. B. Littlefield; Green, Hinckley & Allen; Abbot Phillips and C. A. Kingsley.

For Defendant: John P. Beagan.

SUPREME COURT

Arnold Realty Co.

vs.

William K. Toole Co.

Ex. &c. No. 5514

RESCRIPT

January 6, 1922

In accordance with the opinion of this court rendered December 28, 1921, the plaintiff has been given opportunity to show cause why an order should not be made remitting the cause to the Superior Court with direction to enter judgment for the defendant.

The plaintiff, by its attorney, appeared before the court at the time appointed and argued the case, and after due consideration the court is of the opinion that no cause has been shown by the plaintiff why such an order should not be made. It is ordered that the cause be remitted to the Superior Court with direction to enter judgment for the defendant.

For Plaintiff: Gardner, Moss & Haslam.

For Defendant: Lee, Boss & McCanna and George J. Sheehan and S. J. Fischer, Jr.

Baker and Capotosto Likely to Win Out In 3-Cornered Fight

The election of Assistant Attorney General A. A. Capotosto of this city and Judge Hugh B. Baker of Newport to the Superior Court is foreshadowed by late reports that the adherents of City Solicitor E. J. Daignault of Woonsocket realize that their candidate has little

chance now of winning out in the three-cornered fight for the two judgeships.

Notwithstanding the report that the "Big Six" had agreed tentatively about two weeks ago to back Baker and Daignault the forecast was made in these columns in the last issue that Messrs. Capotosto and Baker would have the advantage when the contest reached the voting stage and today things look even more favorable for the Assistant Attorney General and Judge of the Newport District Court.

It is reported that Isaac Gill, the Pawtucket chieftain, who supported the candidacy of Mr. Daignault, might accept a promise to have the next vacancy go to his man. It is said that Mr. Gill within the last week has received reports that indicate very clearly that the Capotosto and Baker forces would combine their strength. This was a blow to the Daignault candidacy from which, unless signs fail, there is likely to be no recovery. Mr. Gill was handicapped in his backing of Mr. Daignault, it is stated, from the fact that the sentiment in the General Assembly in favor of the Woonsocket man was not very strong.

Reports relative to whether or not Justice Vincent would resign from the Supreme Court before the present session of the General Assembly ends are conflicting. In some quarters it is said he contemplated retirement, while other stories have it that he is not going to resign at the present time.

In the event of Judge Vincent's resigning a strong effort will be made to elevate George T. Brown from the Superior Court to the vacancy on the Supreme bench. This would provide a place on the Superior Court for the candidate who is beaten in the three-cornered contest now in progress.

The election of the two judges to the Superior Court may come up in the Legislature the week after next.

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SUBSCRIPTION PRICE, \$15 A YEAR

No. 16

JANUARY 20, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

MONDAY, JANUARY 23, 1922

Ex5540 M & C	W. G. English vs Thomas F. Keeher	M L
Ex5531 H A A	Emma J. Jarvis vs Edwin Collins, et al.	T F V
Eq492 J L C	Alice J. Law vs C. M. Barnes, et al.	J H
Ex5480 M & M	R. F. Stoeffler vs David E. Flynn	M A S
Ex5388 M & S	Israel Kosroffian vs Thomas Donnelly	J P B
Ex5543 C M B & L	John Garsh vs J. G. Canfield, et al.	W & G
Ex5489	Mary Whalen vs C. M. Dunbar, et al.	

WEDNESDAY, JANUARY 25, 1922

Ex5501 W J H	John W. Ray vs Harrington & Son	C Z A
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FRIDAY, JANUARY 27, 1922

Ex5542 W J B	Emma H. Kimball vs Mass. Accident Co.	E C S
Eq531	Emma H. Kimball vs Mass. Accident Co.	
Ex5519 J H R	Vitiline Hewett vs Clarence N. Hewett	G K & G

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JANUARY 23, 1922

51831 E & A	Francis D. Gilman, et al. vs M. N. Linton	F A J
Eq5596 T & C	R. I. Hospital Trust Co. vs J. W. Degnan	Q & McK
Eq5692 S K & S	Ackerman Co. vs Providence Blank Book Co.	
52200 J H C	A. J. Zura vs J. Blazar, et al.	R & R
Pet.271 J V	Luigi Dupoli vs Atlantic Tubing Company	W A G
Eq5611 C R E	A. D. Remington vs E. A. White	
Eq5684 B & B	S. Klein vs C. S. Cunningham & Sons	
Eq5689 P C J	Bertha Ways vs Marie Gottschalk	

TUESDAY, JANUARY 24, 1922

51500 L & McD	Elizabeth Silverman vs Zlate Garfinkel
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Eq5320 C C & McCJ. M. Anderson vs Adolph E. Johnson	McG & S
Eq5321 C C & McCJ. M. Anderson vs Andrew E. Johnson	McG & S
Eq5323 C C & McCGrant Pierce vs Claus Hanson	McSoley
Eq5322 C C & McCGrant Pierce vs J. F. Donovan	McSoley
Eq5675 M'Manus A. G. Sullivan vs Wallace Bradic, et al.	
47295 C & B S. Tourtellot & Co. vs A. Simonelli	Veneziale
Q & McK Patrick Henley vs George Saxon	
51616 McG & S Jacob Ernstof vs Nut Grove Butter Co.	W C & C
Eq5609 Helfer M. Sherman vs Abe Abick	
Eq5682 Joslin Aramian Technology vs D. Nahabedian, et als.	

WEDNESDAY, JANUARY 25, 1922

Eq5254 McG & S R. B. Deware vs Industrial Chem. Co.	W&G, JAT
Eq5560 J H C Oriette Lowe vs C. E. Angell, et al.	D H M
Eq5520 E & A H. C. Haldane, et al. vs O'Bannon Corp.	
52112 J Harris M. Seigfield vs Aetna Stopper Co.	Cooney & C
Eq5376 C & B C. I. Gage vs Aba G. Shore, et al.	H E & M
43927 Chaffee G. E. Mathewson vs T. K. Fisher	R & R
Div14652 Alex'der Henrietta E. Mumford vs William W. Mumford	
Eq5693 W & G M. Tyler, et al. vs G. Maselle	
Eq5698 C M B & L J. P. O'Hara & Co. vs H C. Osler, et al.	
J.T.W.49174 O L H W. L. Clarke, C. T. vs G. H. McFadden & Bro.	C & H

Jury Trial Calendar

MONDAY, JANUARY 30, 1922

47149 W S Flynn Patrick J. O'Gara vs Ainslee H. Cook	R & H
29570 C & C Sarah L. Donlin vs C. W. Greene, T. T. Warren	F & H
29573 C & C Thomas E. Donlin vs C. W. Greene, T. T. Warren	F & H
50010 R & R Herman Rosner vs Harry Fisher	McG & S
34892 T F Reilly Francis McCaughey vs Rhode Island Company	Sweeney
42973 M & T Cockshutt Plow Co. vs Byron A. Remington	Knauer
50972 Whitman Benjamin F. Tefft, Jr. vs Thomas Dorsey, D. S.	B & B
45930 B & H George Washington vs Charles Spooner	Grimes
49691 Slocum Israel Chernick vs Arthur Berube	W & G
51620 Sullivan-S James Walpole vs John Phillips	R & R
51759 Stiness Bliss Rubber Co. vs Albert Bliss	
49713 P & DeP Gilberto Mari vs Elva Schively	Gunning
50458 P & DeP Antonetta D'Ura vs Annie Moffin	Capotosto-J

TUESDAY, JANUARY 31, 1922

46026 G M & H Waldo Bros., Inc. vs Terminal Warehouse Co.	Stiness-M
42962 C A Walsh Mary C. McHugh vs Williams & Payton	G H & A
48305 Slocum Nathan Cohen vs Fred Murphy	Rickard
50477 Alexander Narr. Wholesale Grocery Co. vs Ernest Haynes	P & S
48852 F & H Fred L. Bernier vs Eugene T. Miller	P & DeP
51512 J H Rickard Geckon Brissin vs Charles M. Cunha	Wildes
50006 A Downing George E. Reynold vs Charles H. Bowen	J E S-O'R
49379 P Romano Gerardo Savastano vs Thomas Walczak	Cooney & C

WEDNESDAY, FEBRUARY 1, 1922

41973 G F Troy Adelard Malo vs Samuel Goldenberg	C R Easton
41984 G F Troy Thomas Maguire vs Samuel Goldenberg	C R Easton
49004 M & T Met. Lumber Co. Robert A. MacDuff	McGauley
51166 T L Carty George Chavlires vs United Electric Ry. Co.	Frost-S
51199 Harlow Edward Medway vs Antonio Pagliaro	Stefano
49976 F & H Clara W. Bradbury, Adm. vs Isabel M. Weeden	W & G
51443 G M & H E. C. Church Co. vs John R. Armstrong	Q & K
50210 C & C Carmine D'Errico vs Emogene Ewold	Walsh
46949 P C Joslin B. Flink & Sons vs J. R. Poole Co.	Stiness

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THURSDAY, FEBRUARY 2, 1922

41500 M H & G	Ida M. Studley vs Dimond Co., et al.	B'f'd, GH&A
48440 A & A	John Hall vs Ludger A. Benoit	W J Brown
51189 Coen	John P. McGirr vs Annie McGirr, Admx.	Berth
50606 R & R	Palma H. Walsh vs Frederick Suter	J H-L
50607 R & R	James J. Walsh vs Frederick Suter	J H -L
49401 H M Devlin	Catherine T. Devlin vs Hyman M. Lyon	
49402 H M Devlin	John C. Devlin vs Hyman M. Lyon	
49403 H M Devlin	Catherine V. Ratcliffe, p. a. vs Hyman M. Lyon	
49404 H M Devlin	Edward C. Ratcliffe vs Hyman M. Lyon	
49405 H H Devlin	Elizabeth O'Neill vs Hyman M. Lyon	
49406 H M Devlin	Jeremiah Quinn vs Hyman M. Lyon	
51478 F & H	Earl W. Roberts vs Alfred V. Ventrone	J Henshaw
51479 F & H	Earl W. Roberts vs Emilia L. Ventrone	J Henshaw
44166 Cooney & C	Baglidasar Semonian vs James Panoras	Clason
51224 S Nathanson	Isaac Perlman vs Abraham Fishman	G Helford

FRIDAY, FEBRUARY 3, 1922

47933 O'S, G&C, Z	City of Providence vs Joseph P. O'Neil et al.	T J Dorney
37783 C & Cahill	Hyman Goldstein vs Rhode Island Company	Whipple
48543 E T Voight	Amanda A. Bernier vs Alexina C. Paulson, alias	W & G
40877 W G & C	T. W. Lind Co. vs Nu-Fastener Co., Inc.	E C Stiness
41150 Stiness	Nu-Fastener Co., Inc. vs T. W. Lind Co.	W G & C
48776 F & H	Clarence L. Kelley, p. a. vs Gilberto Moni	Barnefield
48777 F & H	Thomas F. Kelley vs Gilberto Moni	Barnefield
49168 C R Easton	Mariano Teolis vs Eugenio Marcatelli	P & DeP

SUPREME COURT

New England Trust
Co. of Boston,
Trustee

vs.

Henry Brown

Equity
No. 530

January 17, 1922

OPINION

(Before Brown, J., Below)

SWEETLAND, C. J. This is a bill brought by the trustee named in the will of Mary Elizabeth Woodhull Perry, late of the town of Middletown, deceased, for the construction of certain provisions contained in said will and for instructions. The cause being ready for hearing for final decree has been certified to this court for determination.

The testatrix died on December 10, 1910. Her will was duly probated. The executors after paying certain bequests and fully administering the estate turned over the residue to the complainant to be held by it in trust in accordance with the terms of the will. The provisions of the trust, material to the question before us, are as follows: The complainant as trustee is directed first, to invest said residue and from the income to pay to three persons named "an annuity of two thousand dollars each for and during the term of each of their lives," second, "to pay unto Anna Charlotte Moser Fuller if living, and if not living to pay unto her children in equal shares, an annuity of five thousand dollars for the term of ten years after the death of the testatrix, third, to pay to eight persons named, if living, an annuity of one thousand dollars each for the term of ten years after the death

of the testatrix, fourth, to add any remaining income to the principal of the trust during the term of ten years after the death of the testatrix. That portion of Clause XXVI of the will, with regard to the construction of which the question before us arises, is as follows: "Clause XXVI. At the end of the term of ten years from my death said trustee shall pay over the principal of said trust fund (other than such portion as may be necessary to retain, if any, to pay the three annuities) discharged of all trust in equal shares to those of the following named persons who may be living at that time, namely:" The testatrix then names forty-eight persons. "In the event that either of the above named parties shall not have arrived at the age of twenty-one years the said trustees shall retain his or her share until he or she shall have arrived at said age."

Upon the payment to it of the residue of the testatrix's estate the complainant proceeded to administer the trust in accordance with its provisions. The period of the ten year annuities ended on December 10, 1920. Before that time one of the life annuitants had died. Subsequent to December 10, 1920, after setting aside a portion of the trust estate sufficient to pay the annuities to the two life annuitants then surviving, the trustees divided the trust fund remaining in its hands into as many equal shares as there were beneficiaries mentioned in said clause XXVI who were living on December 10, 1920, at the termination of the period of ten years from the death of the testatrix. To each of

the beneficiaries named in said clause who was living on December 10, 1920, and who had arrived at the age of twenty-one years the complainant, trustee, has paid or is ready to pay one of said equal shares. The share of any beneficiary, living on December 10, 1920, who at that time had not arrived at the age of twenty-one years the complainant retained, awaiting the time when such beneficiary should attain that age. The respondent, Henry Brown, one of the beneficiaries named in said clause, is still a minor and the trustee has retained his share.

The respondent claims that until his majority he is entitled to receive the income of his share, so retained, as such income accrues. The trustee is in doubt as to its duty in that regard and has in its bill asked for instructions upon that point. Also said complainant in open court has withdrawn its request for instructions upon other matters.

The interest of the respondent in his share is vested. Unless the will shows an intention on the part of the testatrix that the income upon such vested interest should be accumulated and not paid to the respondent until he reaches his majority, he is entitled to receive the same as and when it accrues. This is in accord with the rule approved by this court as to income arising upon a vested interest when by the terms of its creation the full enjoyment of such vested interest is postponed. *Rogers vs. Rogers*, 11 R. I. 38 at 76; *Butler vs. Rogers*, 43 R. I. 179.

The amount of the respondent's share *Butler*, 40 R. I. 425; *Aldrich vs Aldrich*.

was fixed at the time of the division of the trust fund, at the end of the ten year period. It was vested although the time of payment was deferred. The right to the income upon this vested interest is also vested in the respondent. The will contains no express provision that the payment of the vested income as well as the vested principal shall be postponed; and such intention on the part of the testatrix will not be inferred in the absence of some provision in the will from which an inference of such intention may fairly be deduced. The complainant calls our attention to the provisions that during the ten year period the surplus of income over the amount required to pay the annuities should be added to the principal. The complainant urges that this indicates a general scheme of the testatrix with regard to income, which would require its accumulation upon the respondent's share until the time for payment of the share arrived. There is not such a connection between the two matters as to warrant the inference which the complainant would have us draw. During the ten year period the paramount purpose of the testatrix was that there should be sufficient income from the trust estate to satisfy the annuities, and she might well require that any surplus of income should go to augment the principal the better to insure the fulfillment of that purpose, in any contingency. Whatever may have been the testatrix's purpose, however, in providing that surplus during the ten year period, that provision furnishes no sufficient basis for the assumption that the

testatrix intended, what she has not expressed, that the income on the respondent's vested share should be accumulated.

Our conclusion is that until the respondent arrives at the age of twenty-one years, and until his share is paid to him by said trustee, the respondent is entitled to receive the income upon said share as and when it accrues. During the respondent's minority such payments should be made to the respondent's guardian for the use and benefit of the respondent.

The parties may present to us a form of decree in accordance with this opinion.

For Plaintiff: Burdick & MacLeod.

For Defendant: Howard B. Gorham.

SUPREME COURT

The Metals Corporation	}	Equity No. 512
vs.		
Universal Optical		
Corporation, et al.		

January 17, 1922

RESCRIPT

(Before Tanner, P. J., Below)

This bill prays for an accounting and asks that certain payments made by the complainant to the respondent, the Universal Optical Corporation, be set aside as constituting a fraud upon the complainant, and that the respondents be ordered to repay to the complainant all money so paid in fraud of the complainant.

The cause was heard in the Superior Court upon bill, answer, replication and

proof and the Superior Court entered its decree, dismissing the bill. From that decree the complainant has appealed to this court.

The bill states fraud on the part of the respondent, the Universal Optical Corporation, in its dealings with the complainant, and also fraud on the part of the respondents, E. Clyde Foster and Earl J. R. Beattey in respect of their conduct in said dealings, as officers of the Universal Optical Corporation and persons having large financial interests in said respondent corporation. The bill also states an unlawful conspiracy to defraud the complainant on the part of the respondents, Foster and Beattey.

It is the settled rule in equity practice in this State that if a bill charges actual, designed, fraud the complainant must establish such alleged fraud or the bill will be dismissed. The application of that rule by this court has been outlined recently by Mr. Justice Rathbun in the opinion in Grant vs. Wilcox, 44 R. I.

Upon the evidence the Superior Court found the issue of fraud in favor of the respondents. The complainant urges that this finding should not be given the force usually ascribed by this court to the findings of a justice of the Superior Court upon an issue of fact; and the complainant points out to us a number of instances in respect to which it claims that the Superior Court in its rescript, upon which the decree was based, had misstated the evidence pertaining to the facts in controversy, and also has shown a misconception as to the state of the evidence bearing upon the question of

the credibility of the complainant's witnesses. We have thoroughly examined the evidence and have reached the conclusion that, notwithstanding these matters to which the complainant refers, we should not be warranted in disturbing the finding of the Superior Court upon the main issue. The charges of fraud against the respondents, the Universal Optical Corporation and T. Clyde Foster, are entirely unsupported, and the complainant has not clearly established its averment of fraud against the respondent, Beatty.

The decree of the Superior Court appealed from is modified in the first clause after the word "dismiss" the words "without prejudice except as to the question of actual fraud." In all other respects said decree is affirmed.

The cause is remanded to the Superior Court with direction to enter a decree in accordance with this opinion.

For Plaintiff: Curran & Hart and Cooney & Cooney.

For Defendant: Huddy, Emerson & Moulton.

SUPREME COURT

Marjorie Wilcox Grant
vs.
Laura L. Wilcox

} Equity No. 449

OPINION

January 18, 1922

(Before Barrows, J., Below)

RATHBUN, J. This is a bill in equity praying that the complainant's deed conveying certain real estate, described in

the bill, to the respondent be set aside or in the alternative that the respondent be decreed to hold said real estate in trust for the complainant. The cause is before this court on the complainant's appeal from a decree of the Superior Court dismissing the bill.

The essential allegations in the bill of complaint are that Andrew J. Wilcox died January 8, 1918, intestate, leaving surviving him a widow, Laura L. Wilcox, the respondent, and as the sole heir-at-law, Marjorie I. Wilcox (Mrs. Marjorie Wilcox Grant), the complainant, a daughter by a former marriage; that Andrew J. Wilcox died, seized and possessed of the real estate in question; that the complainant had for many years lived at home under the control and the dominion of her father, Andrew J. Wilcox, and her stepmother, the respondent; that up to the time of the death of her father the complainant had had no business dealing or experience and was entirely ignorant of the law governing distribution of her father's estate and of her rights therein; that upon the death of Andrew J. Wilcox the respondent assumed the charge and control of the complainant and stood in loco parentis towards her in all things; that on January 22, 1918, the Probate Court of the town of North Providence granted to the respondent letters of administration on the estate of said Andrew J. Wilcox; that the respondent, together with one Frank B. Reynolds, importuned the complainant to execute a deed conveying to the respondent the real estate in question and to make a will in favor of the respondent; that the respondent and said

Reynolds represented to the complainant that, unless she executed such a deed, it would be necessary to sell all of the property constituting the estate of said Andrew J. Wilcox, but that if she would execute such a deed to the respondent it would not be necessary to sell any of said property and that the complainant and respondent could continue to occupy their home and keep the stock and other property located there; that respondent and said Reynolds further represented to the complainant that it was necessary that said real estate should stand in the name of the respondent until the estate of Andrew J. Wilcox was settled; that said respondent promised and agreed that she would reconvey said real estate upon the settlement of said estate; that the complainant after much urging and advising by the respondent and said Reynolds, trusting and believing in their statements and promises, conveyed without consideration to the respondent all of the complainant's interest in the real estate in question; that the complainant, finding said representations and statements in regard to the necessity of transferring the real estate to be false and fraudulent, requested the respondent to reconvey said real estate and that the respondent has refused so to do.

The case was heard by a justice of the Superior Court on bill, answer and proof. When the complainant rested her case said justice dismissed the bill and entered a decree containing the following language:

"First: That no false and fraudulent

representations or statements were made by respondent or any other person in her behalf to the complainant whereby she was induced to execute the deed set forth in the Bill of Complaint.

"Second: That apart from any question of fraud the testimony failed to show that the respondent took any advantage of her relationship to the complainant, or that said respondent held the real estate, set forth in the deed complained of, in trust for the complainant."

Said justice found that the complainant had failed to prove that actual fraud had been committed upon her and it appears from the record that said justice was of the opinion that inasmuch as the complainant had failed to establish her charge of actual fraud it was his duty to dismiss the bill without making further findings. However, said justice at the request of the parties and for the purpose of completing the record did proceed to make other findings, and found that no advantage was taken of the complainant; that she understood and appreciated what she was doing when she made the conveyance and that it was her voluntary intention to give said real estate to the respondent.

We think that said justice after finding that the complainant had failed to establish her charge of actual fraud should have dismissed the bill without making other findings. When at the hearing it appears that charges of actual fraud in a bill of equity have not been established, the rule in this State is that the bill will be dismissed notwithstanding

ing that it states other grounds upon which relief might be granted. *Mt. Vernon Bank vs. Stone*, 2 R. I. 129; *Tillinghast vs. Champlin*, 4 R. I. 173; *Schuyler vs. Stephens*, 27 R. I. 479; *Gilbane vs. Union Trust Co.*, 103 Atl. 485. In *Masterson vs. Finnigan* 2 R. I. 316 and in *O'Connor vs. O'Connor*, 20 R. I. 256, the principle was sustained, but for reasons appealing to the court the complainant was permitted, after paying all costs and amending by striking out all allegations of fraud, to proceed with the bill. In *Aldrich vs. Aldrich*, 10 R. I. 405, the court makes it clear that the rule applies only when actual or moral fraud as distinguished from constructive fraud is charged.

We are aware that in *Earle vs. Chase*, 12 R. I. 374, and in *Providence Association vs. Citizens Savings Bank*, 19 R. I. 142, the court after finding that the bill might be dismissed for failure to prove allegations of actual fraud stated that as the case had been presented on other grounds the court would consider such other grounds. After considering the evidence and such allegations of the bill as did not charge actual fraud the court found that the complainant had failed to present a case which would have entitled him to relief if he had not made the mistake of charging actual fraud which he could not establish. At the time these cases were heard there was no appeal in equity causes. When *Earle vs. Chase* was considered bills in equity were heard on the merits by the Supreme Court sitting in banc. When *Providence Association vs. Citizens Savings Bank* was before the court bills in

equity were heard on the merits by the Appellate Division of the Supreme Court. In each of the two cases next above mentioned the court stated that the bill might be dismissed for failure to prove allegations of fraud; but inasmuch as the case had been presented on all grounds and as the court had all of the evidence before them, said court, having both original and final jurisdiction of the subject matter, did express an opinion on the merits of the case, regardless of the failure to substantiate the charge of actual fraud, apparently for the purpose of advising the parties that it would be useless for the complainant to bring a new bill; but the procedure adopted in these two cases was a departure from the established practice. See *Mt. Vernon Bank vs. Stone*, *supra*; *Tillinghast vs. Champlin*, *supra*. The rule is now settled that when a bill charges actual fraud, no matter what other allegations the bill may contain, the complainant stands or falls upon that charge alone as no other issue is before the court. See *Schuyler vs. Stephens*, *supra*; *Gilbane vs. Union Trust Co.*, *supra*. The decree appealed from is modified by striking out the second clause thereof and inserting in the fourth clause after the word "dismissed" the words "without prejudice except as to the question of actual fraud." In all other respects said decree is affirmed.

The cause is remanded to the Superior Court with direction to enter a decree in accordance with this opinion.

Complainant: George H. Raymond.

Respondent: James Harris and Russell W. Richmond.

SENATE MAY BEAT ACT OR GOVERNOR MAY VETO IT

The failure of the men behind the candidacy of City Solicitor Daignault of Woonsocket to get the amended judgeship measure through the Senate on Wednesday does not augur well for the success of the plan to elect Mr. Daignault to the Superior Court bench. It is no secret among those who watch closely the activities of the Legislature that the proponents of the judgeship bill as amended in the House made an heroic attempt to jam the act through the Senate on Wednesday. And if the temper of the Senate, as viewed by shrewd politicians when the measure came over so hurriedly, is any criterion, the prospects of concurrent action in the upper chamber are not regarded as any too promising.

The matter was referred to the Judiciary Committee in the Senate when it was seen from the vote to inquire into the speed with which the bill came from the House that the opponents of second additional judgeship appeared to be in the majority. Had an attempt been made to pass the measure then and there it is believed it would have been defeated.

Efforts undoubtedly will be made by

the Gill faction to line up enough support to pass the measure before it comes out of the Judiciary Committee. Some observers say, however, that after all is said and done the act as it now stands will be beaten in the Senate. It is possible that the Senate committee may amend the bill back into its original form, which called for the creation of only one additional place on the Superior bench.

In the event that the Senate does act favorably on the bill as it came from the House, it is predicted that the Governor will veto it. And it is doubtful if the matter could be passed over his veto.

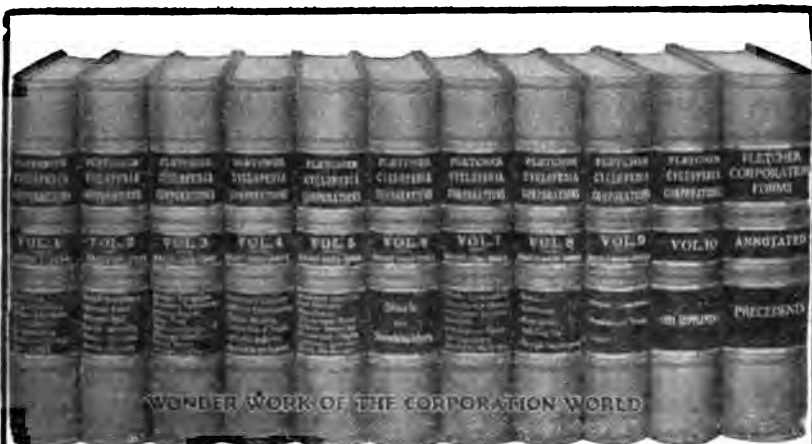
Another possibility is that the Legislature, becoming weary of the bitter factional differences at this time, might decline to create even one additional judgeship, in which case there would be but a single berth—that caused by the death of Justice Doran. This could be brought about by the refusal of the House to pass the act should the Senate amend it back to its original form.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 17

JANUARY 27, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

MONDAY, JANUARY 30, 1922

Ex5545 W & W	C. E. Andrews et al. vs R. I. H. Trust Co., et al.	T & C
Ex5546 B & W	Jonathan Andrews vs R. I. H. Trust Co., et al.	T & C
Ex5547 J L C	Angelo Grande vs Eagle Brewing Company	M & S
Ex5532 J P B	J. E. Nichols vs H. W. Mason & Co.	W & G

WEDNESDAY, FEBRUARY 1, 1922

Ex5567 C & O'C	Geo. H. Clarke, et al. vs Town of East Prov., et al.	A T P
Eq 532 I M	Iona Specialty Co., et al. vs May Goldschine	B & B
Ex5544 E M S	J. L. Greene, Gdn. vs Town Council of Warwick	H R C
Ex5503 H E & M	D. K. Barrett vs Rhode Island Company	C. W.

FRIDAY, FEBRUARY 3, 1922

Ex5533 JAS, ML	Julius Nass vs A. L. Garniss	F F H
Ex5460 M D C	Margaret Dunlavey vs William Taber	CC & M
Ex5440 SJC, WC&C	Owen P. Lee vs E. E. Jones, et al.	GH&A, BWG
Ex5532 J P B	J. E. Nichols vs H. W. Mason & Co.	W & G

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JANUARY 30, 1922

Eq5752 W C & C	Genaro Senopi vs Charles A. Marsh	C & B-G
M.P.667 Chace	City of Providence vs G. P. Howard, et al.	
42328	John P. Brennan vs John R. White & Son, Inc.	G M & H
Eq5596 T & C	R. I. H. Trust Co. vs J. W. Degnan	Q & McK
52200 J H C	A. J. Zura vs Jos. Blazar, et al.	K & R
Pet.571 V B	Luigi Lupoli vs Atlantic Tubing Co.	W A G
Eq5611 C R E	A. I. Remington vs E. A. White	
M & T	Chalmers & Gage vs Commercial Service Co.	
51500 L & McD	E. Silverman vs Z. Garfinkle	

TUESDAY, JANUARY 31, 1922

47526 J F Collins	A. F. Hassett vs B. F. Lindemuth, et als.	W & G
Eq5271 E C S-M	E. C. Stiness vs D. H. Henderson	W & G
51831 E & A	F. D. Gilman vs Minnie N. Linton	Jones
Eq5705 McGauley	Paul R. Riedel vs W. R. Craddock	
Eq5609 Hilfer	M. Sherman vs Abe Abuck	
46947 Richards	Sadie Lythe vs William N. Burnett et al	K H & F
J.T.W.50144 T L C	Patrick McVay vs Walter L. Kelley	J E B
Eq5687 R & R	Charles E. Doe vs Doe & Company, Inc.	

WEDNESDAY, FEBRUARY 1, 1922

Eq5686 Cosgrose	A. M. Grudzuiski vs First Nat. Invest. Under, et al.	
Eq5704 West	J. H. Burgess vs C. Earl Harrison, et al.	
50643 Rich	M. E. Haynes vs Albert S. Grum	Champlin
J.T.W.49174 O L H	W. L. Clarke, C. T. vs G. H. McFadden & Bro.	C & H
Eq5376 C & B	C. I. Gage vs A. G. Shore et al.	H E & M
Eq5708 McG & S	A. J. Zura vs Biltmore Shop, Inc.	

Jury Trial Calendar

MONDAY, FEBRUARY 6, 1922

49631 G H & A	William C. Angell et al. vs Gilberto Moni	P & DeP
49712 Gunning	E. L. Briggs vs Paul R. Piconi	L & McD
49011 J Smith	Agnes Begnoche vs Noah Bogin	P & S
49012 J Smith	Napoleon Begnoche vs Noah Bogin	P & S
49013 J Smith	David Begnoche vs Noah Bogin	P & S
49014 J Smith	Napoleon Geroux vs Noah Bogin	P & S
49134 R & H	Edith S. Shannon vs R. I. Rug Works	Heathman
50695 Slocum	Hyman Abrams vs Kazar Markarian	Rustigian
48718 Stiness-M	Marathon Tire & Rub. Co. vs Invincible Tire Co.	P W Gardner
43266 McLeod	Mary E. Harris vs Western Union Tel. Co.	H E & M
49674 J Collins	Oscar S. Olson vs Comstock & Co.	W A Scott
50065 Stiness-M	H. S. Klehenov vs Albert Silberbeg Silk Co.	Joslin
49044 C & C	Mary Mediros vs Roland Arter	W & G

TUESDAY, FEBRUARY 7, 1922

42964 G H & A M	Hampton Todd et al., Rec. vs Allen & Reed, Inc.	R W Richmond
50405 PC Joslin	E. E. Smith Co. vs Sanderson Mfg. Co.	B S & Letts
48132 I Marcus	O'Sullivan & Levensohn vs Guilfoyle & Daignault	E J Daignault
51167 T L Carty	Agelis Koonaves vs United Electric Ry. Co.	Frost-S
46821 G A B	Antonio Corrento vs Annie Asquino	P & DeP
51237 F A Jones	Morris Levin vs William Reuter	R & R
51259 P & DeP	Cosmopolitan Trust Co. vs John Tutalo	Cianciarulo
48817 J H Rickard	Peter Maple vs William Quinn	J H Griffin

WEDNESDAY, FEBRUARY 8, 1922

50343 W & W	J. Henry King vs Nellie M. Alexander	W & G
50737 Rivelli	Carnato Sclera, p. a. vs William Monahan	F & H
51190 Coen	Daniel Smith vs John Marshall	Carpenter
48750 C S Slocum	John Tutalo vs Joseph L. Flurant	E J Daignault
50434 Alexander	Mary Costa, p. a. vs John Valerio, Amdr.	
51516 G F Troy	Katherine M. Holland vs Ed. H. McCarthy, Adm.	W H McSoley

THURSDAY, FEBRUARY 9, 1922

P.A.784 A G C	James Mohan vs Mary Sylvester	
50493 R & H	Nellie I. Rundell vs Ray Leighton	C Z Alexander
51193 T & L	Herx & Eddy, Inc. vs Central Warp Co.	McG & S
49224 Z-K	Alek Larde vs George W. Dewsnap	G M & H
47607 Mc & S-V	Manuel Arruda vs Ethel A. McCormick, alias	F H Wildes
51211 J Gillrain	Mary Fox vs Louis S. Gervais	F Hebut

50445 F & H
51187 C R Easton

John W. Holland vs Clarence M. Dunbar
Norton J. Lamson vs Pasquale Squilante

P & DeP

FRIDAY, FEBRUARY 10, 1922

47486 Gunning
50770 Heathman
41746 C & DeS
47662 F & H
49871 J F Collins
51871 Prescott
51245 G M & H
51757 P & DeP

Louise Mancini vs Adolph Johnson
Joseph Roy vs Salvatore Catanzoro
Anthony Cianci vs United W. & S. Co.
John J. Grimes vs N. Y., N. H. & H. R. R. Co.
Abby L. Randall et als. vs Amasa P. Taber
Linwood A. Gardner vs Charles O. Marchant
Lizzie H. Davis vs United Railway Signal Co.
Salvatore Ottiano vs Royal Insurance Co., Ltd.

McG & S
Veneziale
F A Jones
E J Phillips

M W Crane
C & H
Cap'tto-L V J

District Court Appeals Calendar

MONDAY, FEBRUARY 6, 1922

47535 Vance
47536 J B L
49477 R & R
45055 McSoley
50562 P & DeP
50569 W & W
50729 Slocum
50863 Flynn
50874 B & B
49854 Stiness-M-B
51535 B & B
46158 Owen
51807 G M & H
51849 F L Owen
50056 W & G
45054 C & O'C
49783 M Costello
50038 L Jackvony

Evangeline DeRoza, Appt. vs Lewis A. Cain
Lewis A. Cain, Appt. vs Evangeline DeRoza
Barney Pulver vs David Morse, Appt.
Samuel Brier, Appt. Nicola Tartaglione
James E. Moran vs Samuel Bomes, Appt.
Santon R. Eustis vs John D. Ellis, Appt.
W. E. Barry, Appt. vs L. E. Jones Construct Co.
Patrick H. O'Rourke vs David Korn, Appt.
David Korn, Appt. vs Patrick H. O'Rourke
Jeanette Doll Co., Appt. vs B. & F. Novelty Co.
Hyman Mitchell, Appt. vs William J. McCarthy
Esidore Namack, Appt. vs Harry Blanck
G. H. Spencer Roofing Co. vs Iadewicz Zolneiz, Ap.
G. E. Fairbanks vs Harry Buffum, Appt.
No. Attleboro Foundry Co. vs E. A. Eddy Mach. Co.
Fortunato M. Thimas vs S. N. Slaimin, Appt.
John Manning vs Frank L. Backus, Appt.
Genemia D'Abate vs Domenico Ardillo, Appt.

J B L
Vance
Prescott
McSoley
McG & S
I Marcus
H W Kimball
B & B
F & F
R & R
C S Slocum
Prescott
Duffy
C J O'Connor
B W Grim
C & Ball
J Ousley
P & DeP

TUESDAY, FEBRUARY 7, 1922

47785 Flynn
50427 Atwood
50554 Johnson
47245 Ar & Ar
50831 J H Coen
50832 J Veneziale
50834 J H Coen
50846 Slocum
50941 Stiness-E-C
51085 Hicks
51589 Slocum
46307 McG & S
50558 F & H
51277 McG & S

Merewether & Dunn vs. Turner Cen. Sys. Appt.
LaSalle Ext. Uni., Appt. vs James L. McKenna
Laura L. Wilcox, Admx. vs John L. Curran, Appt.
N. L. Berry Co. vs Abraham Kapland, Appt.
Hugh McGuckian vs Henry H. Ullman et al., Appt.
Michele Maso, Appt. vs Carlo Goloto. et ux.
Hugh McGuckian, Appt. vs Henry H. Ullman
Sam Licker, et al. vs Charles M. Snell, Appt.
Franklin Mach. Co. vs Greenville Mill, Appt.
The J. B. Morrelle Co. vs Celestino Mori, Appt.
Sam Sarocan vs Harry J. Sarkesian, Appt.
Morris Greenwald vs B. & G. Sheet Metal Co., Ap.
Anna Kiley vs William H. Kiley, Appt.
Caroline Slater vs Katherine Abbott, alias Appt.

Clifford
J T Witherow
Curran
R & R
Crane-Brand
P & DeP
M W Crane
B & B
F L Hurley
C & DeS
J Rustigian
J C Semonoff
C A Walsh
F & F

WEDNESDAY, FEBRUARY 8, 1922

45678 Osterman
49458 R & R
49720 Pettine
49769 Singens
50850 Slocum
50949 J Littlefield
51022 J B L
51058 Stiness-M-B

George L. Porter, Appt. vs Henry Cloutier
Louis Osterman vs R. I. News Co., Appt.
Frederico Patriarca vs Earl G. Page, Appt.
Howard R. Lord Co. vs Mamie Isaacs
Feltham's Truck Tire Ser. vs E. H. Nadeau, Appt.
Walter E. Thornby vs John Hutchinson, Appt.
Walter E. Thornby vs C. Northup, Appt.
Elite Lamp Co., Appt. vs Economy El. Sup. Co.

J B Littlefield
Stiness-M-B
C C & McC
C R Raymond
P & DeP
C C & McC
P S D
J F Cooney

49453 O'Reilly	John R. Lemor vs F. L. Eddy Trucking Co., Appt.	J Ousley
51590 Slocum	Sam Sarocan vs Hagop Setrobian, Appt.	J Rustigian
51382 Costello	Wolf Berger vs Needle, Appt.	P J Quinn
49495 Stiness-M-B	Cayuga Linen & Cot. Mills vs. Eastern Br. Co., Ap.	W Osterman
51797 L B & McC	Arthur Rushton vs Sydney R. Jacobs, et al., Appt.	Finklestein
48377 P C Cannon	Jonas Brook vs William McDonough, Appt.	Osterman

THURSDAY, FEBRUARY 9, 1922

49257 P & DeP	Angelo P. DePasquale vs John Amelio	N Hilfer
44430 F Jones	Mfg. Liability Ins. Co., Appt. vs. Nar. Fin. Co.	Ira L Letts
47408 P C Joslin	B. Flink & Sons vs R. Madonna, Appt.	L Jackvony
50860 Dorney	Daniel DeMorris vs A. J. Choffin, Appt.	Marcus
50862 Slocum	Fred Morris & Co., Appt. vs J. C. Semonoff	Semonoff
51059 Stiness-M-B	Alexander Hamilton Inst. vs John D. Ellis, Appt.	I Marcus
51100 Hicks	Jacob Cossock vs John T. Williams	F & F
51114 E C S	Hollander-Traub Co., Appt. vs K. Blanket Co.	W A H
51591 Slocum	Melrose Cash Market, Appt. vs Manuel Burgess	Q & McK
50593 J Jackvony	John Thompson vs Catherine E. Gallagher, Appt.	W Osterman
50313 Stiness-M-B	Bass & Vudovitz, Appt. vs Julius Koslanowitz	E F McElroy
51721 R & R	Fred M. Swartz vs Ritchie & Paul, Appt.	A Romano
51785 F & H	Frederick Reek vs P. J. McArdle, Appt.	T B Condon

FRIDAY, FEBRUARY 10, 1922

47290 W Bowen	Harvey Taylor vs Frank Stanti, Appt.	Capotosto
49766 R & R	Wunsch & Swartz, Inc., Appt. vs Chas. S. Beochner	C A Walsh
50847 GM&H	Workingmen's Loan Assn. vs Carl G. Wertz, Appt.	R & R
50854 A & A J	Laura L. Wilcox, Admx. vs Edward M. Sullivan, Ap.	Colton
50867 Slocum	Met. Wholesale Groc. Co., Inc. vs Malcom Bros., Ap.	Raymond
51067 Stiness-M-B	Clarke Mfg. Co., Appt. vs D. Ferrara	P & DeP
51105 J Littlefield	Albert H. Miller vs Charles McLaren, Appt.	Collins
51109 Stiness-M-B	Children's Veh. Corp., Appt. vs. Cen. C. & D. G. Co.	Bromson
51281 Coen	Salvatore Pullano vs Giovanni Santagata, Appt.	McG & S
51285 Conaty	Salvatore Pullano vs Guilia Santagata, Appt.	McG & S
51346 W C & C	Brayton R. Collingham, Appt. vs Edward Gee	W & W
51594 Slocum	Arc Vulcanizing Co. vs A. F. Fisher, Appt.	P & DeP
50113 Stiness-B	National Imp. Wool., Inc., Appt. vs Nathan Rites	B & B
45893 P & DeP	John Miller vs Ann Hanley, Appt.	J L Curran

SUPREME COURT

Mary Whalen
vs.
Clarence M. Dunbar et al. } Ex.&c.N.5489

January 19, 1922

OPINION

(Before Brown, J., Below)

RATHBUN, J. This is an action of trespass on the case for negligence brought to recover for personal injuries suffered by the plaintiff and caused by a collision between an automobile in which she was riding as a passenger and another automobile owned by the defendant and operated by his chauffeur. The trial in the Superior Court resulted in a verdict for the plaintiff for \$1500. The

case is before this court on the defendant's exception to the ruling of the trial court refusing to direct a verdict for the defendant.

The collision occurred a short distance south of "Dago Switch" in the town of Warwick near the village of Norwood on the State highway leading from Apoponaug to Providence. Said highway runs in a northerly and southerly course and has a macadam surface eighteen feet in width. A street car track is located on the extreme westerly side of the highway. The plaintiff and four gentlemen were passengers in a Ford touring car owned and operated by William Brown. While said touring car was proceeding on the right hand side of the

macadam surface of said highway in a northerly direction and following another Ford automobile, the speed of the front automobile was suddenly reduced. To avoid running against the rear end of the front automobile, Brown turned his automobile to the left and when one of the front wheels of his automobile was about on a line with the rear wheels of the front automobile, Brown's automobile collided with the defendant's automobile, which was being driven in a southerly direction. Witnesses for the plaintiff gave various estimates as to the speed at which defendant's automobile was running at the time the automobile in which the plaintiff was riding turned to the left. Some of her witnesses estimated the speed of defendant's automobile to be from fifty-five to sixty miles per hour. The highest estimate given by the defendant's witnesses was twenty-five miles per hour. The defendant's counsel admit that Brown was not the servant of the plaintiff; that she had no control over him and that contributory negligence can not be attributed to the plaintiff.

The plaintiff contends that it was the province of the jury to decide whether the defendant's automobile was proceeding at an unreasonable rate of speed and whether his chauffeur had the last clear chance to avoid the accident, and that the trial court did not err in submitting the case to the jury upon these issues.

John W. Holland, one of the passengers in Brown's automobile, and a witness called by the plaintiff, testified as follows: "When he came out he had practically got out half of his machine, but not quite, on the other side." * * * "I didn't know what was the matter. Q. When you turned out how far did you turn out? A. We were at an angle when we were struck. Q. At an angle turning out when you were struck? A. Yes, sir." * * * "Q. But

your car was still practically upon the right side of the highway? A. Not quite. It hadn't quite got out. It was at an angle. Q. Had it got up to the car head? A. The front wheels of our car was about on a line with the rear wheels of the car which was almost stopped. Q. At the time you were struck? A. Yes, sir. Q. And the rear of your car was still back upon your right hand side of the road? A. Practically it was." * * * "Q. As you pulled to the left from behind that car weren't you struck on the right hand side of your machine? A. I couldn't say because it came so quick. I really couldn't say. Q. It was right there when you pulled out? A. Well, not exactly when we pulled out, no sir, we pulled out gradually. Q. It was there before you got out? A. Yes, sir."

Owen Joseph Donnelly, a passenger in Brown's automobile, and a witness called by the plaintiff, testified as follows: "A. You say that Mr. Brown turned out? A. Yes, sir. Q. Which way had he turned out? A. To the left, yes sir. Q. Had the turn that he made been completed when the collision occurred? A. No, sir, it was not. Q. Then the turn was not completed when the accident occurred? A. No, sir, it wasn't. Q. You was just pulling out at that time? A. Yes sir, you are right. Q. You never turned way out? A. No, sir, we were on angle. The collision came. Q. Almost instantly? Yes, sir, almost in about a second."

Frank Stephenson, a passenger in Brown's automobile, and a witness called by the plaintiff, testified as follows: "Q. While you were turning out you were struck? A. Just as we were not quite straight. When we were struck we were not quite straight. We were on the turn. Q. You were on the turn in the process of turning out? A. Process of turning out. Q. Weren't you

turning out when you were struck? A. Yes, sir." * * * "Q. When he said 'almost instantly,' you said 'almost,' did you not? A. Yes, sir, I will say it was almost. Q. In about a second? A. No, sir, not a second." * * * "Q. How long did they continue to run along after he began to make the turn before the collision? A. A couple of seconds, I guess. This all happened so quick. Q. A couple of seconds? A. Yes, sir.

Leo G. Roy, a witness called by the plaintiff, testified as follows: "Q. Will you tell us further as to what the Ford machine did after that, if you recollect? A. Well, after that— Q. Before it was struck. A. I saw it swerve, and it seemed to me as though it never gone any further. I don't know whether it was trying to get back, but it got struck about the same place he swerved out." * * * "A. The rear Ford wheel, the front Ford wheel of the rear Ford was about even with the back wheel of the forward Ford machine."

Tony Giardana, a witness called by the plaintiff, testified as follows: "A. Just as he pulled out they were struck? A. Yes, sir."

The plaintiff testified as follows: "Q. When you were struck he was pulling to the left? A. Yes, sir, I think he was. Q. The machine hadn't got out into the road at the time you were struck? A. No, it hadn't."

Some of the plaintiff's witnesses testified that four or five seconds elapsed between the time when the automobile in which the plaintiff was riding commenced to turn to the left and the time when the collision occurred; also that the defendant's automobile was five hundred or six hundred feet away when the automobile in which the plaintiff was a passenger commenced to turn to the left. Does testimony of such a character, in view of the physical facts presented and other contradictory testimony by the

same witnesses, entitle the plaintiff to go to the jury on the question of the last clear chance of the defendant's chauffeur to avoid the accident? The plaintiff's witnesses testified that the defendant's chauffeur was driving on the right hand side of the macadam surface and that he turned further to the right before the collision occurred. All of the witnesses agree (and the truth of their testimony is established by the photographs of the damaged automobiles) that the left hand front wheel and mudguard of the defendant's automobile collided with the right hand forward wheel and mudguard of the automobile in which the plaintiff was riding. The defendant's chauffeur testified relative to statements made immediately after the collision by Brown, the driver of the automobile, in which the plaintiff was a passenger, as follows: "He said he did not blame the least bit; that he had three things to do, either go to the right or have a rear end collision and not seeing me coming he swung out to the left." Brown was available as a witness, but the plaintiff did not call him to contradict the statements attributed to him or for any other purpose.

From all the testimony it is clear that Brown was confronted with an emergency when the automobile which he was following slackened its speed. To avoid a collision with the rear end of the forward automobile he turned to the left. His escape from a danger which he saw brought him into a peril which, according to the testimony, he failed to observe. The testimony of both the plaintiff's and the defendant's witnesses is to the effect that Brown to avoid the automobile in front of him turned to the left and collided with the defendant's automobile while Brown's automobile was proceeding diagonally across the road. When the collision occurred one of the forward wheels of Brown's automobile

was about upon a line with the rear wheels of the front automobile and the rear end of Brown's automobile was still behind the forward automobile. In view of the above facts it is idle to content that the defendant's automobile, after Brown turned to the left, ran several hundred feet or that four or five seconds, or any appreciable time, elapsed before the collision occurred. When Brown's automobile was running diagonally across the road it could not at the same time be moving sidewise in a northerly direction and yet such conduct would be necessary to account for Brown's automobile keeping pace with the forward automobile.

When the testimony is opposed to established physical facts the testimony must yield to such facts. In *Dodds vs. Omaha & C. B. St. R. Co.*, 178 N. W. (Neb.) 258, the court said: "The rule that a verdict will not be disturbed when there is evidence tending to support it does not apply where the verdict is opposed to undisputed physical facts in the case, or is in flat contradiction of recognized physical laws, and where testimony presented, taken as a whole, is capable of no reasonable inference of such a state of facts as would allow the plaintiff to recover." In *Gorman vs. Hand Brewing Company*, 28 R. I. 180, this court quoted with approval from the case of *Anderson vs. Liljengren*, 50 Minn. 3, as follows: "The rule undoubtedly is that, where the positive testimony of a witness is uncontradicted and unimpeached, either by positive testimony or by circumstantial evidence, either intrinsic or extrinsic, it can not be disregarded, but must control the decision of the court or jury. But a witness may be contradicted by the facts he states as completely to accept it as true merely because there is no direct testimony

contradicting it, where it contains inherent improbabilities or contradictions, which alone, or in connection with other circumstances in evidence, satisfy them of its falsity."

There is no testimony in the case of any probative value upon which can be based a finding that the defendant's chauffeur could have avoided the accident after he saw or should have seen the predicament in which Brown's automobile was placed.

The remaining question is whether the defendant's chauffeur was driving at a negligent rate of speed and if so whether such speed contributed to the accident.

All of the testimony of any probative value relative to this question is to the effect, and the physical facts demonstrate, that the collision occurred while Brown's automobile was proceeding diagonally across the road and when the front of his automobile must have been near the westerly side of the macadam surface and that the collision occurred almost immediately after Brown turned to the left. There was no danger whatever, regardless of the speed of the defendant's automobile, until Brown suddenly drove his automobile across the road in front of the defendant's automobile at such close proximity to it that the collision was inevitable. If it should be conceded that the defendant's automobile at the time the emergency was created was proceeding at a rate of speed in excess of the statutory limit there was no testimony of probative value showing or tending to show that the accident would not have happened if the defendant's automobile had been proceeding at the rate of twenty-five miles per hour or even at a much less rate of speed, or that the speed of the defendant's automobile in any way entered into the cause of the collision. As the speed of the defendant's automobile

in no wise contributed to the accident the rate of speed is immaterial and liability can not be predicated upon the speed of said automobile. *Burlie vs. Stephens*, 193 Pac. (Wash.) 684; *Cross vs. Rosencranz*, 195 Pac. (Kan.) 857.

We think that the trial court should have granted the defendant's motion for direction of a verdict in his behalf. The defendant's exception is sustained. The plaintiff may appear before this court, if she shall see fit, on Monday, January 23, 1922, at 10 o'clock a. m. and show cause why an order should not be made remitting the case to the Superior Court with direction to enter judgment for the defendant.

For Plaintiff: Baker, Spicer & Letts.

For Defendant: Waterman & Greenlaw.

SUPREME COURT

Angeline Parker Gee

et al.

For an Opinion

} Equity No. 533

OPINION

January 19, 1922

STEARNS, J. This petition, for the construction of the residuary clause of the will of James Gee, late of Providence, deceased, is brought by all the parties in interest, who have concurred in stating a question in the form of a special case (Gen. Laws, Chap. 289, Sec. 20).

James Gee died November 11, 1920. His will, which has been admitted to probate, was executed in 1913. In 1918 two short codicils were added, which are unimportant and have no bearing on the question submitted to us. Angeline P. Gee was the second wife of James Gee. By his first marriage, James Gee had five children, namely, Robert, William,

Minnie, Alice and Annie; all of the children are married and have issue with the exception of Annie, who is unmarried. The testator had no legal estate at the time of his decease. His personal estate is inventoried at \$153,416.

The will is short and with the exception of the sixth or residuary clause is clearly and concisely drawn. By the first clause the testator gives to his two sons, William and Robert, his library to be divided equally between them. By the second clause the wife is given the household furniture. By the second clause the wife is given the household furniture, automobiles, horses and carriages and other personal property belonging to testator's stable. By the third clause a bequest of \$1000 each is made to his sister, Annie, and to his nephew, Isaac. By the fourth clause a bequest of \$1000 is made to a certain church. Then follow these two clauses: "Fifth: Having made provision for my said wife satisfactory to her, I give and bequeath to each of my children the sum of twenty thousand dollars to each of them, their heirs and assigns forever. Sixth: All the rest and residue of my estate I give, devise and bequeath to my said wife and to my sons and daughters, their heirs and assigns, forever, share and share alike, per stirpes and not per capita." In the seventh and concluding clause the testator appoints his sons, William and Robert, and his wife, Angeline, to be the executors and the executrix of his will and directs that they shall not be required to give any bond.

The question arises on the meaning of the residuary clause—Does the widow take thereunder one-half of the residue and do the sons and daughters of the testator take the other half as a class; or, do the widow and each of the sons and daughters of the testator individually take one-sixth of the residue? To state the question in another form, did

the testator as between his widow and his children intend equality or inequality in the distribution of the residue?

The intention of the testator governs and is to be made effective, if possible, if it can be accomplished fairly and without violating any unalterable rule of law. This intention is to be ascertained by consideration of the provisions of the entire will. *Church vs Church*, 15 R. I. 138; *Perry vs. Brown*, 34 R. I. 205; *Hazard vs Stevens*, 36 R. I. 90; *Branch vs. DeWolf*, 38 R. I. 395. To assist in ascertaining the intention of testator and to get his point of view the circumstances existing at the time of the execution of the will are to be considered by the court. *Perry, Admr. vs. Hunter et al.*, 2 R. I. 80; *Boardman, Petr.*, 16 R. I. 131.

In this case strong evidence of the testator's point of view and of his intention is found in the language and the structure of the will itself, without the necessity of a resort to external evidence of the circumstances. By the first and second clauses bequests of specific personal property are given to the two sons and to the wife. The fifth clause is highly significant. Therefrom we learn that the testator had made provision for his wife before the execution of his will, which, as it was satisfactory to his wife, must have been known to her and approved by her. Any other provision for the wife apparently was neither expected by her nor required of the testator. Immediately following the above statement and as a part of the same clause, the testator then makes a bequest of twenty thousand dollars to each of his children. This gift is given to the children individually and not as a class. Thus far in the will the testator has treated the wife and the children individually and has shown no intent to establish any class. He has disposed of the larger part of his estate

by different methods and by separate apportionment among the natural objects of his bounty and affection. Up to this time such difference in the distribution of his estate as testator desired to make between the widow and the sons and the daughters has not been left in doubt but has been provided for by specific action and direction. In disposing of the residue—the smaller part of the estate—if the testator desired to make an unequal distribution, that is to give the widow a greater or different share than a child, we naturally should expect the same clear expression of such intention as appears in the other parts of the will; but we do not discover any such intent. On the contrary, we think the intention was clear that the wife and each child should take in equal shares. There is an ambiguity and a contradiction in the terms of the residuary clause arising from the juxtaposition of the phrase, "share and share alike," and "per stirpes and not per capita." The claim of the widow is that two classes are thus indicated, one consisting of the widow and the other of the sons and daughters. Were it not for the addition of the words, "per stirpes and not per capita," there would be no uncertainty as the words, "share and share alike," direct an equal distribution among all of the persons entitled.

"Per stirpes" is thus defined in *Bouvier's Law Dictionary*: "By or according to stock or root; by right of representation. When descendants take by representation of their parent, they are said to take per stirpes; that is, children take among them the share which their parent would have taken, if living." The primary and natural construction of this technical phrase is to consider it applicable to the issue of the children, in the event of the decease of their parent before the testator, rather than to the children of the testator.

Whatever ambiguity there is arises from the inexact use of a legal phrase. Without this phrase, the meaning of the clause is clear and is expressed in language easily understood by a layman. If the two phrases are irreconcilable that construction should be preferred which gives effect to the expression of intention made in plain and ordinary terms rather than in technical phraseology. But any doubt which might arise from a consideration of this particular clause is removed by a consideration of the entire will. We think it was the intention of the testator that the wife and each child should take in equal shares under the residuary clause.

Our conclusions is that Angeline P. Gee and each of the sons and daughters of the testator individually take one-sixth of the residuary estate.

Waterman & Greenlaw for Angeline Parker Gee.

Alfred G. Chaffee for other Petitioners.

SUPREME COURT

In re, Estate of

John W. Rathbun

}
} Ex. & c. No. 5495
}

OPINION

January 19, 1922

(Before Tanner, P. J., Below)

SWEETLAND, C. J. This is an appeal from a decree of the Probate Court of Coventry, denying the petition of Alberic A. Archambault and Raoul Archambault, associated in the practice of law under the style of Archambault & Archambault. In this petition they pray that an allowance out of the estate of John W. Rathbun be made to them for professional services rendered to the said John W. Rathbun and for money expended by them in his behalf.

The appeal was heard before a justice of the Superior Court sitting without a jury and said justice rendered a decision sustaining the decree of the Probate Court. The cause is before us upon the petitioners' exception to said decision.

It appears that John W. Rathbun, of full age, was on April 6, 1918, adjudged by said Probate Court of Coventry to be a person of unsound mind and one who, from want of discretion in managing his estate, so spends, wastes and lessens his estate that he may bring himself and his family to want and suffering and may render himself and family chargeable upon the town for support; and on said day his son, Ralph Rathbun, was appointed guardian of his person and estate.

At some time prior to July 14, 1919, said Ralph Rathbun filed in said Probate Court his petition asking for leave to resign as such guardian, which petition was not heard by the Probate Court, but on July 14, 1919, was withdrawn by the petitioner. At some time prior to November 10, 1919, Ralph Rathbun again filed in said Probate Court a petition asking for leave to resign as such guardian and for the appointment in his stead of his sister, Leila A. Rathbun, a daughter of said John W. Rathbun. On November 10, 1919, in said Probate Court the petition was granted and said Leila A. Rathbun was appointed guardian of the person and estate of John W. Rathbun. On November 6, 1919, said John W. Rathbun by his next friend filed his petition in said Probate Court asking that he be discharged from guardianship over his person and estate, on the ground that he was capable of managing his own estate and that such guardianship was no longer necessary. On December 8, 1919, this petition of John W. Rathbun was denied by said court.

The appellants claims that through

Alberic A. Archambault, Esq., they acted as attorney for John W. Rathbun before said Probate Court in the last three proceedings mentioned above, i. e., in the first petition of Ralph Rathbun for leave to resign, in the petition for the appointment of Leila A. Rathbun and in the petition of said John W. Rathbun for a discontinuance of the guardianship. The appellants petitioned the Probate Court to make them an allowance out of the estate of John W. Rathbun for their services and for money expended by them, the same to be paid them by his guardian, as follows: Fifty dollars for their services in each of said petitions and one hundred and fifty dollars for the cost of the services of four physicians employed by them as experts in connection with the petition of said John W. Rathbun, asking that he be discharged from guardianship.

The appellants base their request for an allowance upon the provisions of Section 12, Chapter 321, General Laws, 1909. Section 7 of said Chapter 321 gives to Probate Courts jurisdiction to appoint a guardian over persons of full age for the reasons stated in Section 7. Section 12, Chapter 321, is as follows: "Sec. 12. If a guardian is appointed for any person liable to be put under guardianship under the provisions of Section 7, the court shall make an allowance, to be paid by the guardian, for all reasonable expenses incurred in prosecuting or in defending against the petition."

Said justice refused to disturb the decree of the Probate Court on the ground that said Section 12 does not authorize an allowance from the estate of the ward on account of any item in the appellants' claim.

In order that the appellants may avail themselves of said Section 12 and thus obtain the payment of their claim through the immediate order and decree of the Probate Court it must appear

that the substance of their claim comes within the purview of that section. The Probate Court must find that the charges for professional services and for money expended for the benefit of the ward are fairly within the designation of reasonable expenses incurred in defending against a petition for the appointment of a guardian for this person of full age.

The appellants' services in connection with the petition of Ralph Rathbun for leaves to resign as guardian clearly were not rendered in connection with the defence of a petition for the appointment of a guardian, nor were the services rendered and the money expended by the appellants in connection with the petition of the ward to be released from guardianship. As to those items of the appellants' claim, if they are recoverable at all, recovery must be sought in some proceeding other than by direct application to the Probate Court for an allowance under the provisions of said Section 12.

The appellants' claim for services in connection with the appointment of guardian appears to us to stand in a different situation with relation to the statute. If said section be given a liberal construction this item may fairly be said to come within its remedial provisions. If the appellants establish that they rendered services in that proceeding then fair compensation for such services would be included in the reasonable expenses incurred in defending against the petition for the appointment of Miss Rathbun. The guardian contends that the appointment of a guardian referred to in Section 12 is restricted to the original appointment and that it is only for expenses incurred in defending against the original petition that the Probate Court may make an allowance under this section of the statute. Before taking action upon the

petition for the appointment of Miss Rathbun the Probate Court was required by statute to serve notice of the petition upon the intended ward, John W. Rathbun, in person, at least 14 days before such action. This notice was given that he might appear in person and be heard upon the petition or that he might have counsel to represent him and protect his interests.

It is true that the question of the necessity for guardianship had been determined in the original petition, but if a new guardian was to be appointed in place of the son, Ralph, the ward was entitled to have his wishes and his interests considered in the selection of a successor. It appears from the evidence that in the original petition the Probate Court adjudged that John W. Rathbun was of unsound mind and also that he was a spendthrift. Whether each ground for the application weighed equally with the Probate Court in its finding we are unaware, but it does appear that at about the time of the appointment of Miss Rathbun, the ward, according to the testimony of certain medical witnesses, was of sound mind and capable of managing his own affairs. Although this opinion was contrary to that of certain other medical witnesses we are justified in the conclusion that John W. Rathbun was possessed of a certain mental capacity and it would be reasonable under the facts before us to permit Mr. Rathbun to appear in his own proper person at the hearing upon the petition to appoint his daughter as his guardian. This is in accord with the practice permitted in *Pratt vs. Court of Probate of Pawtucket*, 22 R. I. 596, *Bennett vs. Randall*, 28, R. I. 360 and *Brown vs. Probate Court of Warwick*, 28 R. I. 370, which practice has been approved in *Champlin vs. Probate Court of Exeter*, 37 R. I. 349. Mr. Rathbun should also be permitted to obtain the assist-

ance of counsel at such hearing and fair compensation for the services of such counsel would be included in the reasonable expenses of defending against said petition.

We are of the opinion that the justice of the Superior Court was in error in holding that said Section 12 was without application to the appellants' claim for services rendered in connection with the petition for the appointment of the present guardian, Leila A. Rathbun.

The appellants' exception is sustained. The case is remitted to the Superior Court for a new trial. At such new trial, if it shall be found that the appellants performed services in behalf of John W. Rathbun in connection with the application of the appointment of his present guardian, then the Superior Court should make such an allowance as shall seem to it to be a reasonable compensation for such services, to be paid by the guardian.

For Appellants: Archambault & Archambault.

For Appellee: Albert B. West.

SUPERIOR COURT

Daniel Kitchen	}	No. 50155
vs.		
Leon Rosenfield		

RESCRIPT

BLODGETT, J. Action for malicious prosecution. Heard on motion of defendant for new trial after verdict for plaintiff.

The testimony was conflicting. Defendant was advised by a competent attorney in good standing before this court to bring certain criminal complaints against plaintiff, upon hearing of which in the Sixth District Court, plaintiff was discharged. This does not under our decisions act as a complete defense to an action for malicious prosecution, and testimony as to whether a complete dis-

closure of all facts was made to the attorney is necessarily submitted to the jury.

The present defendant was at one time convicted of perjury, and this fact was laid before the jury in the case.

Were it not for such testimony affecting the burden of proof there would not be much doubt in the mind of the court the plaintiff had not sustained the burden of proof. The jury evidently did not believe the testimony of the defendant, and the attorney for defendant did not testify.

Motion for new trial denied.

For Plaintiff: C. R. Easton.

For Defendant: W. H. McSoley.

SUPERIOR COURT

Arthur A. Sullivan
vs.
Wallace Bradic and
Rose Bradic

Eq. No. 5675

RESCRIPT

TANNER, P. J. This is a petition for mechanics' lien and is heard upon the motion of the defendants to dismiss the petition.

The grounds are that the notice of intention to claim a lien is defective in not stating the amount of money for which the lien is claimed, also for not describing the materials and labor furnished so that they could be identified by the owner.

The defendants in support of their motion cite an early Maryland and an early Washington case. They also cite Tingley vs. White, 17 R. I. 536, where the court in an obiter dictum seems to indicate a mild opinion that it might be necessary to state the amount. The same may be said of Glynn vs. Zabriskie, 19 R. I. 215; but see Goff vs. Hausmann,

20 R. I. at page 93. There are a number of authorities to the contrary.

Rockell on Mechanics' Liens, 265.

Bloom, Law of Mechanics' Liens, Page 304.

The argument in favor of requiring such explicitness of statement is that it is necessary for the information of the owner in case he wishes to settle with the contractor, also perhaps a third party might find it useful to know the details referred to. But it seems a sufficient answer to say that these details could be readily obtained upon inquiry of the lienor. He would naturally be only too anxious to furnish any details which might facilitate the settlement of his case.

It is a general principle of law that any one having notice of an encumbrance is put upon his inquiry. We do not believe in making the operation of the mechanics' lien statute any harder than necessary. It is sufficiently difficult as it is. While the rights of owners must be protected, we think that they are sufficiently taken care of by giving such notice of intention to claim a lien as will enable them to easily protect their interests by a little diligence on their own part.

For these reasons we feel compelled to deny the petition to dismiss.

For complainant: James O. McManus.

For Respondents: E. P. B. Atwood.

SUPERIOR COURT

John P. Brennan
vs.
John R. White & Sons, Inc.

No. 42328

RESCRIPT

TANNER, P. J. This action is brought upon the plaintiff's demurrer to the defendant's second amended plea to plaintiff's amended declaration.

The declaration alleges that plaintiff had brought suit for one Charles Davis

against John R. White & Sons, Inc., and that said Davis had agreed to give said Brennan for his services an amount equivalent to one-half the value of his cause of action as determined by any verdict recovered in said case or by any settlement of said case effected by said Brennan.

The declaration further alleges that a settlement was made between said Davis and John R. White & Sons, Inc., without the consent and against the protest of said Brennan. Said Brennan therefore seeks to recover the value of his contract for service in accordance with the attorneys' lien statute.

The second amended plea to plaintiff's amended declaration alleges in substance that defendant made a valid settlement with said Davis of his case against said defendant, and that it notified said Brennan to be present at said settlement, and that said Brennan declined to be present at said settlement and protested against the settlement of said case for the amount paid, to wit: \$400.

The plea, therefore sets up said refusal of said Brennan to be present at said settlement as a waiver of his attorneys' lien and right of action. We are of the opinion, however, that Brennan was in no way estopped by said settlement between his client and the defendant, although it was binding as between them. Brennan's contract was not for one-half of the settlement, but for one-half of the verdict or of any settlement made by Brennan. While it is doubtless true that that part of the agreement which confined the settlement to Brennan was void, nevertheless that

part which entitled Brennan to one-half of the value of a verdict was not void. If Brennan had agreed to take half of a settlement, he would have been bound by his client's settlement without fraud, but we are not able to see that the client can bind Brennan by his settlement where he had agreed to give Brennan one-half of the value of a verdict. We think, therefore, that the plea is invalid, since it relies upon an estoppel and a settlement, neither of which binds Brennan.

Demurrer is therefore sustained.

For Plaintiff: Knauer, Hurley & Fowler.

For Defendant: Gardner, Moss & Haslam.

A LAWYER'S LUCK

Attorney William A. Gunning had a lucky break in the impanelment of a jury in Judge Sumner's room of the Superior Court this week to try an automobile negligence case.

After the jury box was filled Mr. Gunning arose and made the customary declaration regarding qualifications, stating that if any man on the panel knew so much about the case to preclude him from giving both sides an impartial hearing, etc., that man was to make the fact known to the court and he would be excused.

A juror named Angell got up and said that he had seen the accident that formed the basis of the suit. The mishap occurred in Wrentham, Mass., and Mr. Angell was coming along in a machine and saw the collision just ahead of him. Mr. Gunning immediately engaged him as a witness for his side.

PLAN FOR TWO EXTRA JUDGESHIPS APPEARS TO BE DOOMED NOW

Senate Expected to Create Only One New Place On Bench, Either by Amending Peck Bill or Passage of Sherwood Measure.—Baker and Capotosto Likely to be Elected.

The Peck bill calling for the creation of two additional judgeships for the Superior Court appears at this writing to be as dead as a door-nail. With the introduction in the Senate on Thursday by Senator Sherwood of Providence of an act to create one additional judgeship the plan of Isaac Gill and his lieutenants to have two additional judgeships is said by competent political observers to have been knocked in the head. The Gill faction apparently was taken by surprise by the unheralded move of Senator Sherwood to have the Senate take original action on the judgeship situation.

As this article will be up in type before Senate adjourns this (Friday) afternoon the Rhode Island Law Record will attempt only to forecast the ultimate outcome of the judgeship contest from the best available reports at this time.

The scheme to create two extra judgeships can be killed in two ways, either by amending the Peck bill back into its original form or by passage of the Sherwood bill.

It was believed in some quarters that the Senate Judiciary Committee would report the Peck bill in time to be acted upon before Thursday, when the Sherwood measure is on the calendar. This

would call for action in the Senate on the Peck bill Tuesday and the prediction is made by shrewd politicians that the Senate will pass an amended bill so as to create only one extra judgeship. If the Peck bill is not reported this (Friday) afternoon it cannot go on the calendar till Thursday and the Sherwood measure would take precedence on that day.

Which ever bill is acted upon by the Senate the indications clearly point to a program calling for the creation of only one additional judgeship. And the action of the Senate will be concurred in by the House, unless the calculations of the Sherwood forces go entirely awry. Under such a travel of proceedings the election of Assistant Attorney General Capotosto of this city and Judge Baker of Newport is said to be assured—one for the extra judgeship and the other for the vacancy caused by the death of Judge Doran.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 18

FEBRUARY 3, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

MONDAY, FEBRUARY 6, 1922

(MOTIONS)

Ex5583	E. R. Chester vs T. D. Picard	
Ex5588 J F H	Josephine Macchia vs J. H. Ducharme	
Ex5594 M & B	W. L. Wilcox vs F. H. Swan et al.	
Ex5595 M & B	D. P. Morris vs F. H. Swan et al.	
Ex5596 I S H	Miss Swift, Inc. vs Z. K. Hoffman et al.	
Ex5597 I S H	Miss Swift, Inc. vs Z. K. Hoffman et al.	
Ex5598	Frances Lucy, p. a. vs John F. Allen	C M B & L
Ex5599	J. J. Prendergast vs John F. Allen	C M B & L
Ex5600	Helen M. Prendergast vs John F. Allen	C M B & L

MONDAY, FEBRUARY 6, 1922

Eq 492 J L C	Alice J. Law vs Clara M. Barnes et al.	J H-J C K
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WEDNESDAY, FEBRUARY 8, 1922

Ex5556 A A C	State vs Rolf G. Adams	G R M
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FRIDAY, FEBRUARY 10, 1922

Ex5571 JBL-LVJ	Carlo Golato vs G. Mercurio	P & DeP
Ex5378 S S B	L. R. Golden vs R. L. Greene Paper Company	R T B
Ex5379 S S B	Carrie Golden vs R. L. Greene Paper Company	R T B
Ex5519 J H R	V. Hewitt vs C. N. Hewitt	G K & G
Ex5542 W J B	E. H. Kimball vs Mass. Accident Co.	E C S
Eq 531 W J B	E. H. Kimball vs Mass. Accident Co.	E C S

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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, FEBRUARY 6, 1922

Eq5706 West	J. T. Burke vs R. E. Burns	
Eq5709 Raymond	M. W. Grant vs L. L. Wilcox	
Eq5710 G H & A	T. H. Ray vs J. R. Ray et al.	
Eq5712 West	J. A. Fritz et al. vs W. A. Presbrey et al.	
Eq5152 E M S	G. Senafi et al. vs Charles A. Marsh	Ball-G
Eq5611 Easton	R. I. Remington vs E. A. White	
47526 Collins	A. F. Hassett vs B. F. Lindemuth et al.	W & G
Eq5609 Hilfer	M. Sherman vs Abe Abrick	
Eq5660 McG & S	Beatus Weinbaum vs J. M. Weinbaum	
Eq5714 Pettine	P. L. Monahan et al. vs W. A. Presbrey et al.	
52540 C M B & L	A. B. Farnham vs Harold C. Osler	
52123 Com. & Can	Federal Finance Corp vs R. S. Goldsmith	

TUESDAY, FEBRUARY 7, 1922

Eq5281 E & A—W	J. S. Linton vs J. E. McDevitt et al.	J E B
Eq5629 J P Fox	B. G. McElroy vs Mary E. McEvoy et al.	C J O'C
Eq5707 Ballou	R. M. Chase vs Chase & Reed	
Eq5687 R & R	C. E. Doe vs Doe & Company, Inc.	B & B
Eq5228 J L C	Orig. Brad. Soap Wks., Inc. vs Wakefield Mills, Inc.	

WEDNESDAY, FEBRUARY 8, 1922

51945 McK & B	R. A. Quinley vs A. Desautels.	M F C
51188 Bennett	P. Mortkivian vs William C. Toner et al.	J C Cawley
Eq5689 P C Joslin	Bertha Wayss vs Marie Gottschalk	
Eq5704 Hart	J. H. Burgess vs C. E. Harrison et al	
Eq5658 McG & S	Beatrice Weinbaum vs Trinity Sq. Jewelers, Inc.	

Jury Trial Calendar

MONDAY, FEBRUARY 13, 1922

48677 P & S	Lund Textile Co., Inc. vs Joseph Messamery et al.	T L Carty
46844 E & A	Lizzie F. Olney vs Taxi Motor & Transfer Co.	L B & McC
45315 G W Greene	Matthew J. Bowlan vs Con. Rendering Co. et al.	G P & T
45316 G W Greene	Mary McIsaac vs Con. Rendering Co. et al.	G P & T
45526 G W Greene	Joseph Labelle, Ap. Con. Rendering Co. et al	G P & T
46849 P & DeP	Arcangelo Sardiello vs Crown Clothing Co.	Wildes
42849 G J Sheehan	Francesco Librandi vs Anastasia P. O'Keefe	Com & Can
52079 Bowen	Esther Perry vs Hugh McGuckian	Coen
45758 F & H	James Harding vs Vincenzo Berarducci	J F Collins

TUESDAY, FEBRUARY 14, 1922

50469 Gunning	David Broadwin et al. vs Bessie Zuckerberg	Brand
45512 J F Collins	Michael Benoit vs Joseph Lavoie	Ar & Ar
50771 Heathman	Sarah E. Shepard vs Charles T. Colvin	P & S
50773 Heathman	Sam Shepard vs Charles T. Colvin	P & S
51220 Gunning	Annie D. Woodward vs Travelers Insurance Co.	Barnefield
51752 McG & S	S. Tourtellot & Co. vs F. Davis & Co., Inc.	B & Macleod
49652 C A Kiernan	Leonard Lee vs Northway Motor Sales Co.	S K & S
50100 Veneziale	Antonio Capio vs Antonio Marola et ux.	B C
52085 P & DeP	Mariana DiMeo, Admx. vs Gaetano D'Ordine et al.	J Veneziale

WEDNESDAY, FEBRUARY 15, 1922

47706 Ziegler	George Eberhard vs Willis A. Fenner	A Grieve
51226 A S & A P J	Elmira Star Gazette, Inc. vs Bankers Pub. Assn.	W & G
51123 C S Slocum	Helen B. Wardwell vs George Lawton	J Harris
50415 Q & K	City of Prov. vs Panteles Papatheodirou et al.	
50461 McElroy	Prov. Auto Eq. Co., Inc. vs Roderic R. Laferriere alias Carpenter	J J R-C R E
43248 F & H	Joseph F. Canavan vs James J. Whalen et al	
51700 T H Holton	William F. Sword vs Cady Moving & Storage Co.	
51712 I Marcus	M. J. Cross & Co. vs Matie C. Messler	W & G
51995 J G Connolly	George Panagotakopoulos vs Peter Psihoyios	Levy

THURSDAY, FEBRUARY 16, 1922

45155 A & A	Napoleon C. Robillard vs Durrell-Gregory Co., Inc.	
46582 F A Jones	J. Hope & Sons Eng. & Mfg. Co. vs L. H. Comstock	W A Scott
51168 T L Carty	George Papatheodore vs United Elec. Ry. Co.	Frost-S
51821 E H Ziegler	John Ivanowski vs Stanley Boulkouski	J W Grimes
51822 E H Ziegler	Mary Ivanowski vs Stanley Boulkouski	J W Grimes
51630 P & DeP	John Venditti vs Anna Rohrich	A N Peterson
51774 J LeCount	Harry Miller vs James Bartley	P & S
51773 J LeCount	Rose Miller vs James Bartley	F & S

FRIDAY, FEBRUARY 17, 1922

47352 W S Flynn	Gertrude I. Landry vs Bernier & Robidoux	C & B G
48483 Stiness-M	L. & R. Co. vs Crescent Braid Co., Inc.	G E & Cross
50486 P & DeP	Fred J. Topping vs John V. Price	R & H
49413 C R Ballou	Thomas McGuirk vs J. N. Lalonde	A & A
50181 F & H	City of Providence vs Andrea Santangini	P & DeP
50182 F & H	City of Providence vs Andrea Santangini	P & DeP
41125 S & S	Clelia Forcina vs The Rhode Island Company	C Whipple
41128 S & S	Andrea Forcina vs The Rhode Island Company	C Whipple
49385 P C Cannon	Thomas F. Fogarty vs Louis H. Murphy	W J Brown

District Court Appeals Calendar

MONDAY, FEBRUARY 13, 1922

49733 J Littlefield	Avizynis Dvarechar vs Garabed B. Meldosian, Ap.	G A Breden
50418 S & S	Thomas Vallone, Ap. vs Curran & Burton, Inc.	Barnefield
50785 McSoley	Lyon & Regan vs Robert F. Griffith, Ap.	J C Hammill
50869 Slocum	Franklin Auto Sup. Co. vs East Prov. Trucking Co.	E R Walsh
51069 Stiness-M-B	S. Eisenberg & Sons, Ap. vs A. Marks & Sons, Ap.	R & R
51062 Stiness-M-B	U. S. Hoffman Mach. Co., Ap. vs Elliott Zarely	L B & McC
51288 R G E Hicks	Nathan Sallinger vs Ergamie Gentil, Ap.	J Veneziale
51595 C S Slocum	Irving P. Esty vs Peter Legar, Ap.	J E Dooley
50838 Owen	Harry B. Bornside vs Goodman & Salk, Ap.	Horenste'n
51857 W & W	Smith Bros. vs Horace G. Knowles, Ap.	D P McDonald

TUESDAY, FEBRUARY 14, 1922

46896 P & DeP	Morris L. Sackin, Ap. vs Henry Rock	W H McSoley
49569 R & R	Siravo & Lombardi Co. vs C. H. Wagner, Ap.	Bromson
49856 B S & L	Addie I. Gray vs Richard Redfern, Ap.	E H Ziegler
50383 R & H	Gertrude Cole vs Rose Ella Lewis	GH&A-S J C
50870 Slocum	Standard Auto Supply Co. vs Joseph Pastina, Ap.	B & B
51049 Rivelli	Enrico Cipriano, p. a. vs Raffaele Feoli, Ap.	J B Lawlor
51070 Stiness	Excello Merchandise Co., Ap. vs A. Gruenewald	McG & S
51071 Stiness-M-B	Ideal Muslin Co., Ap. vs Adolph Gruenewald	McG & S
49759 Stiness-M-B	Smyrna Fruit Co., Ap. vs United Wholesale Gro. Co.	P & DeP
51727 R & R	Manhattan Wholesale Gro. vs Joseph Najarian, Ap.	Boyajian
51859 R & H	Macaulay & Phillips, Appt. vs Harry L. Welch	C & Ball
50362 W & G	Percy L. Smith vs Baptist Church in Warren, Ap.	Lindemuth
49955 J Edwards	Everett D. Higgins vs John S. Perry, Ap.	R Richmond

WEDNESDAY, FEBRUARY 15, 1922

50304 W & E F	William W. Doyle vs Wolf Semonoff, Ap.	L Semonoff
49725 J Veneziale	Vincenzo Fazzino, Ap. vs Nicola Leone	P & DeP
49726 P & DeP	Nicola Leone vs Vincenzo Fazzino, Ap.	J Veneziale
50841 R & R	Nathan Gordon vs Vincenzo D. Amico, Ap.	Cianciarulo
51073 Stiness-M-B	Pioneer Rubber Co., Ap. vs Max Latt	R & R
51315 Joslin	George W. Bugbee vs Grant Storage Bat. Co., Ap.	Alexander
51332 S M & B	Gasparo Russo, Ap. vs Fabre Steamship Co.	Healy-M
51553 W C & C	Robert W. Powers vs William A. Connell, Ap.	J L Curran
51572 C & H	Max Genser, Ap. vs Morris Golomba	Curran & C
51597 C S Slocum	Irving P. Esty vs Jacob Heilborn, Ap.	W & W
48900 Stiness	American Electric Co., Ap. vs Millers, Inc.	Wildes
51943 J Harlow	Manuel Coreia, Ap. vs Greyhound Motors Corp.	Stiness-M

THURSDAY, FEBRUARY 16, 1922

48969 P & DeP	William Williams vs Adolphus Falvini, Ap.	Capotosto-J
49505 R & R	Sitzer Bros., Ap. vs Benjamin Bronstein	B & B
50878 Slocum	A. DeLucca vs J. Guidetti	Holton
51110 E C S	Federal Loan & Ex. Co. vs Marianna S. Neves, Ap.	J S N
51348 S M B	N. Y. Silk Exchange, Ap. vs McCarty Dry Goods Co.	Daignault
47766 Alexander	Manuel R. Santos, Ap. vs Joseph Almeida et al. alias	Q & McK
51649 E Sullivan	Hollis Mosher vs Rose H. Marriot, Ap.	B W Grim
49754 C Remington	Burton Elliott vs Walter E. McGonigle	A West-C
51087 B & B	Soloman Karn vs Harold B. Congdon, Ap.	W Gunning
49785 W J Brown	Jonathan Watterson, Ap. vs Jos. A. Bowen	F & H
50420 L B & McC	James V. Crofton vs John Cronan	D A Colton
50105 C R Easton	Daniel Kitchen vs John Broadman, Ap.	McG & S
50922 C R Easton	Daniel Kitchen vs John Broadman, Ap.	McG & S
50368 C R Easton	Daniel Kitchen vs John Broadman, Ap.	McG & S

FRIDAY, FEBRUARY 17, 1922

49089 P & DeP	The New England Gro. Co. vs B. Mansueti, Ap.	Easton-C R
45913 R & R	James Hassen, Ap. vs George Vosetanepian	Corcoran
50877 Slocum	Arc Vulcanizing Co. vs R. Markarian, Ap.	Rustigian
50882 R & R	N. E. Pants Mfg. Co. vs Edward Norman, Ap.	B & B
50888 Slocum	Berman & Dressler, Inc. vs W. Kanchusky, Ap.	Rien
51029 Stiness	LaSalle Ext. Uni., Ap. vs John McKeon	Dillon
51060 Stiness-M-B	Proctor & Gamble Dist. Co., Ap. N. E. Lunch	T J Dorney
51600 C S Slocum	Am. Sheet Metal Works vs Hilda E. Swanson, Ap.	C R Easton
51796 Boyajian	Garabed Harootinian vs Aram Azarian, Ap.	Wildes
51926 McManus	Arthur A. Sullivan vs Leila P. Andrews	Voigt

SUPERIOR COURT

Alfred Carlson et al.
vs.
United Railway
Signal Co. et al.

No. 51952

RESCRIPT

HAHN, J. Heard on motion of defendant, United States Fidelity & Guaranty Company, to dismiss the action against it on the ground that under the provisions of Chapter 2094 of the Public Laws, effective April 27, 1921, the plaintiff was without statutory authority to join this defendant in said action.

From the pleadings it appears that the defendant, United States Fidelity & Guaranty Company, had previous to April 27, 1921, issued a policy to the defendant, United Railway Signal Company, insuring this defendant against

liability for personal injury and that after April 27, 1921, an explosion occurred through the negligence of the defendant, United Railway Signal Company, whereby Mauritz A. Carlson, son of the plaintiffs, was injured and under the provisions of Section 9 of Chapter 1268 of the Public Laws the plaintiff joins the United States Fidelity & Guaranty Company as party defendant.

The motion to dismiss is based upon the ground that Chapter 2094, which provides that suit shall not be brought jointly against the insured and insurer, does not apply to policies written previous to April 27, 1921, provided the injury was sustained thereafterwards.

Chapter 1294 of the Public Laws and Section 9 of Chapter 1268, so far as the obligation of the insured is concerned, are practically identical, Chapter 1268

referring to personal injuries and Chapter 2094 to personal injuries or property damage. In the case at bar the injuries claimed are personal injuries and this renders the defendant, United States Fidelity & Guaranty Company liable under either of these statutes. A comparison of Section 9 of Chapter 1268 and Chapter 2094 of the Public Laws shows clearly that the difference so far as personal injuries are concerned is in the mode of procedure. It is well settled that no person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights.

Lewis, Sutherland's Statutory Construction, Vol. 2, p. 1226.

13 Am. & Eng. Ency. of Law, 696.

Jones vs German Ins. Co., 110 Ia. 75.

Smith vs. Northern Neck Mut. Fire Ins. Co., 38 L. N. S. 1016.

As Chapter 2094 is practically a re-enactment of the major portion of, and preserves and protects the rights given by Section 9 of Chapter 1268, the difference being in the mode of procedure, there appears to be no legal basis for holding that policies in effect on the date of the passage of Chapter 2094 should not thereafter be subject to the provision thereof.

Motion to dismiss granted.

For Plaintiffs: D. P. Macdonald.

For Defendants: Huddy, Emerson & Moulton.

WHERE TEXAS DRAWS THE LINE

(From the Galveston News)

Personally we claim that women have a right to smoke if they want to, but we would hate to see a housewife making pies with a pipe in her mouth.

ELECTION OF TWO JUDGES TO TAKE PLACE NEXT WEEK

The bill creating one additional judgeship in the Superior Court looks as though it would be enacted into law early next week. The Senate having passed it, the House is expected to concur and then the measure will go to the Governor for his signature.

A grand committee will probably be called before the end of the week to elect two judges, one to fill the vacancy caused by the death of Judge Doran and the other to fill the berth newly created by the judgeship bill.

Three candidates probably will be nominated—Asst. Atty. Gen. A. A. Capotosto of this city, Judge Hugh B. Baker of Newport and City Solicitor E. J. Daignault of Woonsocket. Unless all signs fail Messrs. Baker and Capotosto will be elected.

SAFETY FIRST

(From the Topeka Capital)

"There is no chance of my ever adjudging the wrong man insane," says a Topeka alienist. "Whenever I am called in an insanity case I always have some one point the patient out to me before I make the examination."

MULTUM IN PARVO

(From the Kansas City Star)

A little boy in Soldier sat down the other day and wrote a newsy letter to his grandmother. This is the letter: "Dear Grandma: I have sold my goat and joined the church. Lovingly, Paul."



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1922

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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 19

FEBRUARY 10, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

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Supreme Court Calendar

MONDAY, FEBRUARY 13, 1922

Ex5496 C W-H E E	F. H. Swan et al. vs Pelletier Trucking Co.	T P C
Ex5540 M & C	W. G. English vs Thomas F. Keeher	M L
Ex5548 E C S-DHM	B. F. Goodrich Rub. Co. vs Millers, Inc.	F H W
Ex5532 J P B	J. E. Nichols vs H. W. Mason & Co.	W & G

WEDNESDAY, FEBRUARY 15, 1922

Ex5513 S K & S	Screw Mach. Prod. Corp. vs Cutter & Wood Sup. Co.	M & S
Ex5586 C & C	Melkon Semonian vs James Panoras	H A C
Ex5480 M & M	Ralph F. Stoeffles vs David E. Flynn	M A S
Eq460 M A S-W & G	James J. Dugan vs Manuel Sinas	K H & F
Ex5560 K H & F	Manuel Sinas vs James J. Dugan	M A S-W & G

FRIDAY, FEBRUARY 17, 1922

Ex5564 L & M	Swinehart Tire & Rub. Co. vs B'dway Tire Ex., Inc.	F H W
Ex5570 P & D	Wilhelmina Roy vs Levi J. Roy	C & C
Ex5553 H E & M	H. M. A. Hathaway vs C. F. Reynolds	B W G
Ex5576 C R E	Lorenzo Deacutis vs G. Di Fiore et al.	J F M
Ex5440 S J C-C & H	Owen P. Lee vs E. E. Jones et al.	GH & A-BWG
M.P.373 S & H	Aquidnick Nat. Bank vs R. W. Jennings, Gen. Treas.	

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, FEBRUARY 13, 1922

52369 W & G	L. C. Daneker vs N'hwestern Mut. Life Ins. Co.	G H & A
52370 W & G	L. C. Daneker vs Aetna Life Ins. Co.	G H & A
Eq5505 P J Q	Henry Charleson vs Silver Lake Beach Am. Co.	
Eq5228 J L C	Original Brad. Soap Wks. vs Wakefield Mills, Inc.	
51188 Bennett	Paul Mortkiran vs W. C. Toner et al.	J C

TUESDAY, FEBRUARY 14, 1922

Eq5326 P W G	G. W. Russell vs E. F. Weitz	McG & S
Eq5722 H E & M	S. E. Clafin et als. vs Robert McLaughlin	
Eq5723 Costello	Mary Sylvester vs James Mohan et al.	
Eq5660 West	Beatrice Weinbaum vs John Weinbaum	J P B

WEDNESDAY, FEBRUARY 15, 1922

50454 M & T	Amer. Cotton Oil Co. vs Narra. Dairy Co., Ltd.	W C & C
49162 G H & A	M. L. K. Lalonde vs L. Lalonde	
Eq5113 E C S	Contreville Mfg. Co. vs Oswe Textile Co.	C M B & L
52291 C H McF	Samuel Palais vs Lewis Duhamel	E L J
50237 Richard	Alsace Worsted Co. vs Adams Express Co.	G H & A
Eq5720 Griffin	A. Gilstein vs Philip Kauras et al.	
Eq5710 G H & A	T. Howard Ray vs Jennie R. Ray et al.	
Eq5689 Joslin	Bertha A. Mays vs Marie Gottschalk	
Eq5717 Carty	Thomas Amudola vs Charles I. Gage, Tr., et al.	
Eq5716 DeS	Nicola Baddessa vs Antonetta Baddessa	
5654 Neves	A. DeLuz Correia vs D. P. R. Lopez	McK & B

Jury Trial Calendar

MONDAY, FEBRUARY 20, 1922

47385 McSoley	Joseph Machardo vs Manuel Costa	G E & C
50422 P & S	Sallie J. Lane vs Frank H. Swan et al.	Whipple
50428 J Smith	Rose Feldman vs Abraham H. Klein	W C & Curt's
50429 J Smith	Max Feldman vs Abraham H. Klein	W C & Curtis
48771 C & B	City of Providence vs Frank Pisaturo et al.	W S Flynn
48772 C & B	City of Providence vs Frank Pisaturo et al.	W S Flynn
48773 C & B	City of Providence vs Frank Pisaturo et al.	W S Flynn
50494 R & R	Joseph Scheck vs Nat. Amusement Realty Co.	B & Walsh
51185 Rivelli	G. Cunnetta vs Ernestina Marianetti	McSoley
51186 Rivelli	Mariannina Cunnetta vs Ernestina Marianetti	McSoley
51416 S & Lovejoy	Vreeland Bros. vs Anthony G. Silva	T P D
47146 P & DeP	Guiseppa Alesandro vs Guiseppe Calabro et al.	B & C
47200 B & C	Josephine Calabro vs Guiseppe Alesandro	P & DeP
44891 R & R	Phili Zawatsky vs Imerial Knife Co.	J P Hartigan
45164 F & H	Harry Baker vs Frank Dixon	W & G
51618 Stiness-M-B	Morosini & Co. vs Arthur E. Rall	G H & A
50065 Stiness-M-B	H. S. Klebenov vs Albert Silberberg Silk Corp.	P C Joslin
50960 B & W	Augustus Bailey vs Harry W. Buffum	C J O'C

TUESDAY, FEBRUARY 21, 1922

50467 Gunning	Anna M. Swanson vs Frank H. Swan et al.	Whipple-W
50772 Heathman	Andrew Wach vs Frank Pollock et al.	Addleman
51039 R & H	Marie T. Miller p. a. vs Wallie L. Clarke, C. T.	Chace-H
51169 Carty	Harrison W. Bowker, Admr. vs. Frank H. Swan et al.	Frost-W
47291 L S	Mary Murdick vs Adolph E. Johnson	McG & S
51708 Prescott	Winifred T. Phillips vs Arnold Bucklin alias	Dorney
50392 Stiness	George W. Chapin vs Central Warp Co. et al.	M F Costello
49897 J T Bannon	John H. Saunders vs Samuel H. Zucker	J G Connolly
51192 Easton	Walter Brindle vs Raymond Riley	F. & H

WEDNESDAY, FEBRUARY 22, 1922
(Washington's Birthday—No Assignments)

THURSDAY, FEBRUARY 23, 1922

48809 G F Troy	M. E. Lucey vs John Hope & Sons Eng. & Mfg. Co.	Jones
50510 Colton	John Connors p. a. vs Pedro Manuel Simon	Heathman
50682 Gunning	Herbert Barker p. a. vs George E. Marceau	F & H
P.A.785 F & M	John Boudoro vs St. Mary's Orphanage	

46426 Wildes	Catarina Fusco Testa vs Vincenzo Cipriano et al.	P & DeP
50218 B & B	Sarah B. Temkin vs Hyman Frank et al.	McG & S
50320 B & B	Max Price, Appr. vs Hyman Frank	McG & S
50321 B & B	Charles Temkin, App. vs Hyman Frank	McG & S
51938 Q & Kernan	John E. Pugh vs George F. Wheelwright	R & Hagan
51825 P C Joslin	E. E. Smith Co. vs Thomas F. Keeher	F F Nolan
49365 Stiness-M-B	Eagle Cornice Co. vs Vincenzo J. Oddo	P & DeP

FRIDAY, FEBRUARY 24, 1922

49122 W & G	Henry W. Mason vs J. E. Nichols	J P Beagan
41228 AS & AP J	Commonwealth Hotel Con. Corp. vs G. L. Miller	W & G
PA.788 W S F	Martin A. Dalton vs John E. Kelly	
45784 M & T	Edward J. McGuirk vs Local Union 476, U. Assn.	J J R-D J H
48516 E C S-M	Firestone Tire & Rubber Co. vs H. J. Legace	F & H
51414 Ziegler-K	Manuel Gonsalver vs Arthur Ward	R J B
23737	Garabed G. Melidosian vs May Clifford et al.	McSoley-JMC
48260 J F Collins	Patrick Donnelly vs Domenica Ruggieri	P & DeP
48261 J F Collins	Mary Donnelly vs Domenica Ruggieri	P & DeP
50515 P & DeP	Evaristo Nanni vs Samuel S. Meilo et als.	J S Casey
49713 P & DeP	Gilberto Moni vs Elva Schively	W A G

SUPREME COURT

Maria Felica Ciaccia

vs.

The General Fire
Extinguisher Co.

Equity No. 525

(Before Tanner, P. J., Below)

OPINION

February 3rd, 1922

VINCENT, J. This is an appeal by Maria Felicia Ciaccia from a decree of the Superior Court, denying her petition for a commutation of the future payments which would become due to her under the Workmen's Compensation Act.

On November 6, 1920, the husband of Maria sustained injuries in the course of his employment by the respondent Fire Extinguisher Company which, a few days later, resulted in his death. He left a widow and two minor children.

On December 31, 1920, an agreement was entered into which was duly filed in, and approved by, the Superior Court which provided for the payment to the petitioner, as the widow of the deceased, the sum of ten dollars per week for a period of three hundred weeks.

On June 18, 1921, said payments hav-

ing been made for a period of more than twenty-six weeks, the said Maria filed her petition in the Superior Court praying that the future weekly payments be commuted.

On June 29, 1921, this petition was heard in the Superior Court and on September 14, 1921, the same was denied and the following decree entered: "(1). It appears that the petitioner is the mother of two minor children, Phillipo and Cosimo, aged 14 and 12, respectively; that no provision is made in said petition for the protection of the interests of said minor children in said future compensation payments should the petitioner predecease said children within the time of the remaining compensation period. (2). That a commutation of future payments is not for the best interests of the petitioner."

From this decree the petitioner has appealed to this court, setting forth in her reasons of appeal that the findings of the Superior Court, as expressed in its decree, are erroneous and against the law.

At the hearing in the Superior Court it was claimed by the Fire Extinguisher Company that the minor children of the

deceased employee should be made parties to the petition, either as petitioners or respondents, on the ground that their possible rights and interests in future payments were necessarily involved; and that the employer and insurer were entitled to protection against their future claims in case the widow should die within the compensation period.

We think that the children were necessary parties to the proceeding. If the widow should not live through the compensation period, the children, upon her death, would become entitled to the compensation, thereafter payable, for their own use under Section 6, Article II of the act. These rights of the children are contingent, but they are nevertheless legal rights which must be considered. These rights cannot be extinguished unless the children are made parties and are before the court.

The employer is also entitled to protection. If the children are not parties to the petition, any decree entered thereon commuting future payments would not bind them. Upon the death of the petitioner within the compensation period, the children could, under the plain terms of the statute, legally call upon the employer to make payments to them thereafter for the portion of the three hundred weeks then remaining.

The petitioner further contends that she is entitled to have a commutation of future payments on the ground that she is about to remove from the United States and take up her residence in Italy.

There is nothing before us to show that any evidence was presented to the Superior Court to the effect that the petitioner was about to remove from the United States and we see no occasion for any consideration of that feature of the petitioner's claim.

The appeal of the petitioner is dismissed, the decree of the Superior Court

is affirmed, and the cause is remanded to said court for further proceedings.

For the Petitioner: William A. Gunning, Pasquale Romano.

For the Respondent: Ralph T. Barnefield.

Judges A. A. Capotosto and H. B. Baker May Go On Circuit For Present

Although Presiding Justice Tanner of the Superior Court has not yet indicated what work will be assigned to Assistant Attorney General A. A. Capotosto and Judge Hugh B. Baker of Newport when they are sworn in as judges of that bench, it would not be surprising if he sent them both out on the circuit for the present to relieve the congestion of the docket that exists in the outside counties.

Messrs. Capotosto and Baker were elected to the Superior Court this (Friday) afternoon in grand committee, fulfilling the prediction made in these columns three weeks ago and adhered to each succeeding week, notwithstanding various newspaper reports of other combinations.

The two successful candidates will appear before Walter S. Reynolds, Clerk of the Superior Court, to be sworn in. It is not believed that any public ceremony will mark their taking of the oath of office, such as characterized the swearing in of Justices Sweeney and Barrows and the late Justice Doran. The full Superior Court bench attended when these three justices took the oath of office and Presiding Justice Tanner made a neat little address in which he told the new wearers of the ermine that they "must share in the joys and the sorrows of the office."

Days on the Circuit

JANUARY

FIRST MONDAY—
Motion Day in Newport.
SECOND MONDAY—
Woonsocket
FOURTH MONDAY—
Kent County
Regular Session and Motion Day.

FEBRUARY

FIRST MONDAY—
Newport
Motion Day
THIRD MONDAY—
South Kingstown
Regular Session and Motion Day
See to fixing date of Westerly Session.

MARCH

FIRST MONDAY—
Newport
Regular Session and Motion Day.
FOURTH MONDAY—
Kent
Regular Session and Motion Day.

APRIL

FIRST MONDAY—
Newport
Motion Day.
THIRD MONDAY—
South Kingstown
Regular Session and Motion Day.
See to fixing date for Westerly Session.

MAY

FIRST MONDAY—
Newport
Motion Day.
SECOND MONDAY—
Woonsocket Session.
FOURTH MONDAY—
Bristol
Regular Session.

JUNE

FIRST MONDAY—
Newport
Regular Session and Motion Day.
FOURTH MONDAY—
Kent County
Regular Session and Motion Day.

JULY

FIRST MONDAY—
South Kingstown
Motion Day.
FIRST MONDAY—
Newport
Motion Day.

SEPTEMBER

FIRST MONDAY—
Motion Day.
THIRD MONDAY—
South Kingstown
Regular Session and Motion Day.
Kent County
Motion Day.
See to fixing date for Westerly Session.

OCTOBER

FIRST MONDAY—
Newport
Regular Session and Motion Day.
THIRD MONDAY—
Woonsocket
Regular Session.
FOURTH MONDAY—
Kent
Regular Session and Motion Day.

NOVEMBER

FIRST MONDAY—
Newport
Motion Day
THIRD MONDAY—
South Kingstown
Regular Session and Motion Day.
See to fixing date of Westerly Session.

DECEMBER

FIRST MONDAY—
Newport
Regular Session and Motion Day.
THIRD MONDAY—
Bristol
Regular Session.

The above schedule compiled from
the Statutes by the Clerk's Office of
the Superior Court.

The Essential Complement

Character and Ability, while of vital importance among the attributes of the successful executor and trustee, are seldom so effective as when reinforced with the essential complement, Permanence.

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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 20

FEBRUARY 17, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

February 20 to March 6, 1922
(No Assignments)

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, FEBRUARY 20, 1922

Eq5271 Stiness-M	E. C. Stiness vs D. H. Henderson	Q & McK
Eq5721 E & A	William Gammell et al. vs Counting House Corp.	
J.T.W.48132 I M.	O'Sullivan & Levensohn vs Guilfoyle & Slagnot	E J D
52532 S W F	John Silverman vs M. Saperstein	S I Jacobs
Eq5639 Q & McK	P. W. McKiernan vs M. J. Gallant	G A B
Eq5686 Remington	A. M. Grudzinski vs First Nat. Inv. Underwriters	
Eq4628 P & DeP	G. Restino et al. vs O. Tafuri	
49962 W S J	W. M. Peacock Co., Inc. vs J. M. Gilman	F L O
50486 P & DeP	F. J. Topping vs J. V. Price	R & H
Eq5724 H E & M	J. I. Markowitz et al. vs Empire Thread Co., Inc.	
52369 W & G	Lidia C. Daneker vs Northwestern Mut. Life Ins. Co.	G H & A
52370 W & G	Lidia C. Daneker vs Aetna Life Ins. Co.	C H & A
Eq5228 J L C	Original Bradford Soap Wks. vs Wakefield Mills Inc.	

TUESDAY, FEBRUARY 21, 1922

47081 M D C	J. S. Ryan vs F. Hebert, Admr.	G K & G
Eq5675 McManus	A. A. Sullivan vs Wallace Brodie et al.	Atwood
52195 Stiness-M-B	U. S. Tire Co. vs J. H. Preston, Jr.	G H & A
Assgt. Ziegler	In re Assign. of Frank C. Fuller	
Eq5630 Com & C	A. M. Polleys vs Obidah Armone	
Eq5725 Coen	Alex Cameron vs E. M. Warren	

WEDNESDAY, FEBRUARY 22, 1922
(Legal Holiday—No Assignments)

**The Man Who Never Saves money usually gets
nowhere.**

**It's up to you. Save and have money of your own.
It will bring with it a spirit of independence.**

**A savings account here will be a beginning. It will
help you to arrive.**

National Exchange Bank

63 WESTMINSTER STREET

Jury Trial Calendar

MONDAY, FEBRUARY 27, 1922

45210 W McSoley	Frederick P. Drowne vs Harry Champagne	C J O'C
45276 J J F-C O'C	Harry Champagne vs Frederick P. Drowne	McSoley
50815 W & W	John Tarvix vs James McManus	G K & T
51205 Osterman	John V. Phelan vs James E. Toher	W & W
41862 E & A	William Handley vs John F. O'Gorman	L T Murphy
47562 R & R-A	Anna Schwartz vs Mary Louise Donnelly et al.	T J McG
47563 R & R-A	Fannie Schwartz vs Mary Louise Donnelly et al.	T J McG
47561 R & R-A	Max Charren vs Mary Louise Donnelly et al.	T J McG
47560 R & R-A	Harry Charren vs Mary Louise Donnelly et al.	T J McG
43872 McSoley	Mary A. Lynch vs Ida S. Hopkins	W G & C
51641 F & H	Albert J. Leary et al. vs Victor Anderson et al.	C & B
51689 Stiness-M	Herman M. Unrath vs Metal Utilities Corp.	J L Jencks
49208 W Brand	Abraham Golden vs Alphonse Roy	A & A

TUESDAY, FEBRUARY 28, 1922

47161 Gunning	John E. Collette vs Earl G. Page	C C & McC
50621 R & H	Agnes I. Melpi vs Herbert E. Barney, T. T.	Patterson
50827 McSoley	Isabella Barley vs Manuel Perry	Hammill
51217 McSoley	Bessie Czynowski vs Mike Gregelewicz	
51218 McSoley	Albert Czynowski vs Mike Gregelewicz	
M.P.499 McG & S	George H. Howard et al vs City of Providence	Brand
49297 B & B	Morris Homonoff vs Morris Blackman	E S Chase
51818 Stiness-M	Harold Neuhoof vs Mrs. H. Hauben	McG & S
		L J Tuck

48840 F & H Mary Durant vs John B. Nash
 48841 F & H Gertrude Durant vs John B. Nash
 51187 C R Easton Norton J. Lamson vs Pasquale Squillante

Stiness-M
 Stiness-M
 P & DeP

WEDNESDAY, MARCH 1, 1922

47975 W & G William R. Walker & Son vs Harry Fulford
 50786 Joslin B. Flink & Son vs Samuel Ackerman et al.
 49330 A & A Phillippe La France vs Michael Paliano
 50133 T F Vance Joseph Kulig et al. vs Thomas Walczak
 49946 C N Wooley Thomas Walczak vs Antoni Kulig et al.
 49181 B & B Rose Shatkin vs Louis Seitman
 49198 Stiness-M-B Feris Karam, Admr. vs Mrs. Gardner Easton
 49335 W Prescott Cosmo Votta vs John J. Johnson
 51012 Stiness-M M. S. Korach vs Moshassuck Valley R. R. Co.

A G Chaffee
 C & DeS
 C N Wooley
 T F Vance
 Helford
 S & Harvey
 McG & S
 E & A

THURSDAY, MARCH 2, 1922

50736 G H & A National City Bank vs Narra. Wholesale Groc. Co.
 50498 S & G Carlo Delfino vs Henry A. Borchardt
 49615 Osterman Andrew G. Blair vs Sarah J. McDonald
 49637 W & G Joseph di Spirito vs James A. Vendettuali
 50008 F & H Mary C. Sheffield vs John W. Hesketh
 50009 F & H Mary C. Sheffield vs William Hesketh
 45517 P & DeP Andrea Santangini vs Concetta Marrocco
 51864 T L Carty Nora Cartwright vs Arthur B. Chartier et al.
 51425 Stiness-M-B Providence Buick Co., Inc. vs George Lee

C Z A
 E B Arnold
 M & M
 D A Colton
 G A B
 G A B
 B C
 G M & H

FRIDAY, MARCH 3, 1922

51125 Stiness-M Dexter Yarn Co. vs Nathan Sallinger
 51126 Stiness-M E. & H. Silk Co. of N. Y. vs Nathan Sallinger
 51127 Stiness-M Gamwell & Ingraham vs Nathan Sallinger
 51128 Stiness-M J. H. Hambly Co. vs Nathan Sallinger
 51409 R & H John Carr vs George L. Bowen
 51410 R & H Edith V. Carr vs George L. Bowen
 51644 Ziegler-K C. Herbert Gay vs Alexander C. Tainsh
 28776 G M & H Union Trust Co. vs Thomas F. Gilbane
 48565 P & DeP Antonio Lombardo vs Rhode Island Company
 52145 Champlin Ardrinna Meglio vs Luigi Battista

J E Dooley
 J E Dooley
 J E Dooley
 J E Dooley
 L B & McC
 L B & McC
 C & Canning
 McG & S
 Whipple-E
 P & DeP

SUPREME COURT

George Hawley Clarke,
 et al.
 vs
 Town of East Providence
 et al.

Ex. &c.
 No. 5567

OPINION

(Before Tanner, P. J., Below)

VINCENT, J. This case comes to us upon exceptions to the decision of the Superior Court dismissing the appellant's appeal from a decree of the Probate Court of the Town of East Providence. The appellants, by their original petition in the Probate Court, asked that certain personal estate formerly belong-

ing to one Eugene Wilson, deceased, should be turned over to them, as the heirs-at-law of the said Wilson, a final settlement of the estate of the deceased having been reached in that court. The Probate Court dismissed the petition of the appellants for lack of jurisdiction and on appeal to the Superior Court the action of the Probate Court was affirmed.

On May 15, 1909, Eugene Wilson, a resident of East Providence, deceased. He had been for many years a recluse and was not known to have any near relatives or next of kin.

On May 17, 1909, the Town Council of East Providence, at a special meeting, passed the following vote, viz.: "On mo-

tion of Councilman Phillips it is voted, That Fred B. Halliday, Town Treasurer of the Town of East Providence, be directed to take into his possession all the real and personal estate of Eugene Wilson, late of said East Providence, deceased, intestate, which to the said Eugene Wilson at the time of his death, did appertain and belong, for the use of said Town of East Providence, until the heir or other legal representative of such deceased person shall call for the same, to whom the same shall be delivered on being claimed and evidence of the right of title of the claimant shown, according to the Statutes and Public Laws in such case made and provided."

On September 27, 1909, James H. Williams of East Providence, an undertaker and creditor, petitioned the Probate Court for the appointment of an administrator upon the estate of the said Wilson. Upon this petition, Fred B. Halliday, being the person named as Town Treasurer in the vote of the town, was appointed administrator on October 25, 1909, and gave bond in the sum of \$15,000.

On January 10, 1910, the administrator filed an inventory, showing personal property amounting to \$15,887.75.

On November 2, 1915, Halliday ceased to be Town Treasurer.

Nearly four years later, June 4, 1919, Halliday filed his first and final account, as administrator, showing a balance of \$21,913.30. On August 25, 1919, this account was allowed by the Probate Court of East Providence and the balance ordered turned over to the Town Treasurer of said town.

This order was complied with by Halliday, who withdrew the fund from the Providence Institution for Savings on August 26, 1919, and turned it over to Herbert E. Barney, then the Town Treasurer of said town. At that time no

heirs had appeared to claim the estate and were still unknown.

On July 10, 1920, the appellants filed their petition in the Probate Court of the town of East Providence, praying that the estate of the said Wilson be turned over and delivered to them, they being entitled thereto.

William E. Smith, town clerk of the town of East Providence, and also clerk of the Probate Court of that town, was called as a witness at the hearing in the Superior Court. From his testimony it appears that the appellants addressed a letter to the Town Council asking that a time and place might be fixed for the presentation of their claim against the Wilson estate. The date of this does not appear in the testimony of Smith and we do not find the original or any copy of the communication among the papers in the case. The date, however, is not especially important in view of the fact that in reply to this request the Town Council, on September 8, 1920, passed a vote of which presumably the appellants were informed, to the effect that the town of East Providence would release the property in question whenever directed to do so by the proper court.

The appellants by their bill of exceptions present but a single question. Was the Superior Court in error in affirming the decree of the Probate Court of the town of East Providence, dismissing the appellants' petition?

Although the Town Council of East Providence passed the vote directing the treasurer to take possession of the Wilson property, such possession of the personal estate was not immediately taken. There is testimony that a small part of the Wilson property, which was real estate, was taken at once into the possession of the town through its Treasurer, Halliday, under and by virtue of the

vote before referred to and that the town has since retained its possession thereof.

Before the town finally obtained possession of the personal estate, a creditor appeared in the person of an undertaker, who made application to the Probate Court for the appointment of an administrator. Whether or not he might have proceeded against the town for the satisfaction of his claim, had they possessed the personal estate or at a later time become possessed of it, is a question which is not presented to us and which we need not discuss. We can only consider the question which is raised by the exceptions.

Mr. Halliday was duly appointed administrator and proceeded to and did settle the estate, so far as the Probate Court was concerned, his final account being presented and allowed.

Mr. Halliday was also the Town Treasurer of East Providence at the time of his appointment as administrator but, so far as the settlement of the estate in the Probate Court was concerned, he simply acted as any administrator would in the settlement of an estate.

He did not, so far as appears, up to the time of the final settlement of his account, act in behalf of the town in any respect regarding this estate. In fact, for about four years prior to the settlement of his final account, he had not been the Town Treasurer of East Providence.

Upon the settlement of the final account, the court ordered the administrator to turn over the balance in his hands, consisting of a large deposit in the Providence Institution for Savings, to the town and on the day following such order he complied therewith.

The vote of the town directing the Town Treasurer to take possession of the Wilson estate had never been re-

scinded. The most that could be said is that it was allowed to remain in abeyance during the settlement of the estate in the Probate Court.

With the final settlement of the estate there was nothing further for the Probate Court to pass upon and we think that its action in directing the turning over of the money to the town was proper.

Whether or not the town was entitled to and might have taken possession of the whole estate under the terms of the statute, notwithstanding the proceedings in the Probate Court, we need not discuss. The personal estate did not come into the possession of the town until the administrator, Halliday, in obedience to the order of the Probate Court, turned it over to Herbert E. Barney, who was then the Town Treasurer.

Section 1 of Chapter 317, Gen. Laws of 1909, gives to Town Councils the right to direct the Town Treasurer to take possession of any real or personal estate upon the death of any person who shall leave no heirs or legal representatives to claim the same.

We do not think that the failure of the Town Council to take immediate possession of the personal estate in the present case operated in any way to debar it from the exercise of that right whenever in its judgment it became desirable to do so. It was not unreasonable for the town to delay the assertion of this right while the Probate Court was acting upon and disposing of claims against the estate.

We think that the Probate Court, having accomplished the final settlement of the estate and having decreed that the balance be turned over to the town, had no further jurisdiction in the matter and also that the decisions of the Superior Court in favor of the appellees was fully justified.

The appellants' exceptions are over-

ruled and the case is remitted to the Superior Court for further proceedings.

For Clarke et al.: Cunningham & O'Connell.

For Town of East Providence: H. T. Patterson.

SUPREME COURT

Morris F. Conant

vs.

Furnace Improvement
Company

Ex. &c.

No. 5452

RESCRIPT

(February 15, 1922)

After the opinion of this court, filed on January 6, 1922, the plaintiff filed a motion for reargument by leave of court. This motion does not suggest any matter which was not fully considered and passed upon by the court before delivering its opinion.

The motion for reargument is denied and dismissed.

SUPREME COURT

Ernest E. Bevan

vs

Annie F. Brooks

Equity No. 514

RESCRIPT

(Before Barrows, J., Below)

This is a bill in equity wherein the complainant seeks to have a warranty deed, given by him to the respondent, declared to be a mortgage, with the privilege of redeeming it upon payment of the money loaned to him by the respondent. After a hearing upon bill, answer and proof by a justice of the Superior Court, a final decree was entered granting the relief prayed for.

The respondent has duly prosecuted her appeal from said decree to this court and now claims that said decree is against the law and the evidence and the weight thereof.

It appears from the evidence that,

October 24, 1919, Mrs. Charlotte M. Brown conveyed to the complainant, by warranty deed, the house and lot in dispute. The property was sold for \$7275.00 and the complainant paid for the same by giving a purchase price mortgage to Mrs. Brown for \$5500.00 and paying her the balance in cash out of \$2000.00 received by him from the respondent. On the same day the complainant conveyed said property to the respondent by warranty deed, stating in the deed that the conveyance was made subject to a mortgage for \$5500.00.

The testimony proves that the complainant married the daughter of the respondent in January, 1914, and that from this time, until she sold her house on Smithfield avenue in October, 1919, he and his wife lived with her. The complainant is a real estate broker and sold the respondent's house for her. For several years he had acted as agent for Mrs. Brown and knew that her real estate was for sale. After the sale of the Smithfield avenue house, the complainant asked the respondent to buy Mrs. Brown's property, but she declined to do so and asked him why he did not buy it and he replied that he did not have the money. After further discussion, the respondent agreed to let the complainant have \$2000.00 with which to purchase the Brown property with the understanding that the deed of the same was to be in his name and that her daughter was to take charge of the rents and pay the expenses connected with the property. Upon the purchase of the Brown property, the complainant, his wife, and the respondent occupied it until June, 1920 when the complainant left on account of marital difficulties, which resulted in the filing of a petition for divorce by Mrs. Bevan. Bevan vs. Bevan, 44 R. I. 12.

It is admitted that the respondent advanced \$2000.00 to the complainant at

the time he purchased the property from Mrs. Brown, and the important question in this case is whether the deed of the complainant to the respondent was intended to convey said property to her absolutely or only as security for the money advanced. The deed was executed and delivered by the complainant to the respondent on the same day that he purchased the property from Mrs. Brown, October 24, 1919, but it was not recorded by the respondent until June 11, 1920, which was after the complainant had left home. The complainant testifies that he asked the respondent to purchase the Brown property; that she declined to do so; and that she loaned him \$2000.00 so he could make the purchase. He first thought of giving her a mortgage or a note for the money, and then he thought it would be better to give a deed and place it in her hands for protection, and it was agreed that the deed should not be recorded until something happened. The respondent testifies that she declined to take a second mortgage upon the property and claims unconditional title to it, and denies that she agreed not to have the deed recorded. These parties are supported in their claims by the testimony of witnesses and upon the conflicting testimony the trial court found that the deed given by the complainant to the respondent was not intended to be an absolute conveyance but was a conveyance as security to protect the respondent for the money she had advanced.

This court has repeatedly held that the findings of fact made by a trial justice upon conflicting testimony are entitled to great weight and, as there is sufficient testimony in the case to support the findings of fact and they do not appear to be clearly wrong, this court will not disturb them.

It is well settled that a conveyance of land, absolute on its face, may in equity,

by means of parol evidence, be shown to be a mortgage and it was intended to be security for the payment of a debt. 27 Cyc. 991.

The respondent's appeal is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to that court for further proceedings.

For Complainant: Tillinghast & Collins and McGovern & Slattery.

For Respondent: Joseph C. Cawley.

SUPERIOR COURT

Arthur Jones

vs.

John F. Jacobson

No. 49359

RESCRIPT

(February 15, 1922)

HAHN, J. Heard on demurrers to replications.

The replications in the above entitled case are two in number, one based upon waiver of defendant's right to re possess himself of the demised premises, and the other alleging facts estopping the defendant from setting up breach of the terms of the tenancy. In each instance these replications set out the words used by the landlord to justify the tenant in assuming that the landlord would not take advantage of any right obtained by reason of non-payment of the rent of the premises after the time which under the law would give the landlord the right to re-possess himself of the same.

It being alleged in these replications that, before and after the rent, which it is stated in the plea, was in arrears and the basis upon which defendant re-possessed himself of the premises, the defendant used words (the same being set forth in the replications), which gave the plaintiff the right to assume that the defendant would not demand or take possession of the premises by reason of such non-payment of rent.

It is well settled that a landlord by

language or conduct before any breach of conditions by a tenant may waive such condition or license its breach.

Tiffany, Landlord & Tenant, Vol. 2, p. 1396.

Saner vs Meyer, 87 Cal. 34.

The question as to whether the landlord made statements amounting to a waiver of his right to terminate the tenancy for non-payment of rent or estop him from setting up non-payment of rent as a breach of the terms of the tenancy is under all the circumstances of this case a question for the jury.

Demurrers overruled.

For Plaintiff: C. R. Easton.

For Defendant: Frank H. Wildes.

SUPERIOR COURT

Florence E. H. Campbell,
App't.

vs.

Herbert L. Carpenter,
Adm'r. c. t. a.
Appellee

P. A.

No. 709

RESCRIPT

SUMNER, J. This is a motion for a new trial on behalf of the appellant, assigning substantially the following grounds: That the verdict is against the law and the evidence; that the amount awarded the administrator is grossly excessive; and that the appellant has discovered new and material evidence.

The appellant has appealed from the allowance of the account of the administrator in the Probate Court. Various items of the account were in dispute during the trial and various amendments of the account were made by the appellee, so that when the case went to the jury, the only question was, as to the compensation of the administrator.

The fee allowed by the Probate Court was \$10,000 and the amount fixed by the jury \$8,833.33.

The appellant claimed that the administrator managed the estate so improvidently, and so negligently kept his accounts that his compensation as fixed by the Probate Court should be materially reduced.

The trial of the case continued eight days; the facts were fully brought out, and the verdict of the jury could be said to have been justified by the evidence.

The appellant has submitted seven affidavits in support of her claim of the discovery of new and material evidence.

Leon W. Campbell and his wife, Edna M., submitted two sets of affidavits, one set being in rebuttal. They say in substance that Leon W. Campbell, who was one of the legatees under the amended will of Malcolm Campbell, was not present at the probate hearing at which the administrator's fees were fixed, but left the matter in the hands of his counsel, Everett L. Walling, Esq., that Mr. Walling entirely misrepresented what occurred at the hearing and did not fully inform Mr. Campbell as to his legal rights with reference to appealing from the allowance of the administrator's account; that later he was informed that Florence E. H. Campbell had appealed from the allowance of the administrator's account; that Mr. Walling was to notify him of the trial of this appeal, which he did not do; that he was at all times after the approval of the account of the administrator by the Probate Court opposed to the allowance of this account and dissatisfied with Mr. Carpenter's administration of the estate.

Leon W. Campbell admits that up to the time of the trial of this cause he had not stated to Mr. Walling that he desired to oppose the allowance of Mr. Carpenter's account and that he and his wife were "eminently satisfied" with the result of Mr. Walling's services; however, he says that he did not learn the

real facts of the case until subsequent to this trial; that Mr. Walling never informed him that there were income items that had not been included in the account; that he was ignorant of the sale of certain mill stocks by the administrator to which he strenuously objected; and that when he allowed Mr. Walling to act as Mr. Carpenter's attorney, he did so without a full knowledge of the facts of the case.

Mr. Walling, in his counter affidavit, states that he was the attorney for Leon W. Campbell in his litigation arising out of the will of Malcolm Campbell; that through his efforts a compromise was entered into as a result of which a new will of Malcolm Campbell was finally probated with terms extremely beneficial to Leon W. Campbell; that he urged Mr. Campbell to attend the hearing at the Probate Court at which the administrator's account was allowed; that later he informed Mr. Campbell of the amount that had been allowed the administrator for his fee and told him that he might take an appeal if he so desired, and fully informed him of his rights in the matter; that he (Mr. Campbell) subsequently expressed his approval of Mr. Carpenter's action in the management of the estate; that prior to the trial of this appeal Mr. Walling wrote Mr. Campbell informing him that Mr. Carpenter desired him (Mr. Walling) to act as his attorney, and asked Mr. Campbell if he was willing Mr. Walling should so act, and later Mr. Campbell wrote, expressing his willingness that he should so act; that prior to the trial of the case he had numerous personal conferences with Mr. and Mrs. Leon W. Campbell at which nothing was said to suggest that they were opposed to the allowance of Mr. Carpenter's account; that subsequent to the trial he had further correspondence with Mr. Campbell, in which Mr. Campbell asked him to rep-

resent both Mr. Carpenter and himself with a view to settling this litigation.

The theory of the appellant in offering these affidavits is that she would have had the assistance of Mr. and Mrs. Leon W. Campbell in preparing her case and that the knowledge that other devisees under the will were opposed to the allowance of the administrator's account would have been an important factor in the minds of the jury in determining their verdict.

Although Leon W. Campbell in his affidavit claims to have been very much dissatisfied at the conduct of Mr. Walling in failing to inform him of the trial of the appeal, yet, after it is over, he still continues his employment, and his correspondence displays no resentment whatever.

Mr. Campbell is apparently a business man, not a recluse, and he must have understood the nature of Mrs. Florence E. H. Campbell's appeal, and that he could help it along if he sympathized with it. It is not reasonable to suppose that he would have allowed Mr. Walling to act as attorney for Mr. Carpenter if he had had any real grievance against Carpenter or strongly objected to his actions. He had ample opportunity to examine Carpenter's accounts both before and after they were approved by the Probate Court and make any inquiries he saw fit, but he neglected to do so and now comes in and says he left it all to Mr. Walling and Mr. Walling deceived him.

The court is not convinced that Mr. Walling failed to do his duty by his client and must ascribe Mr. Campbell's present grievance, if he really has any, to his own neglect or lack of diligence in not looking up these matters at the proper time.

The active appearance of Mrs. Camp-

bell upon the present scene may be the explanation of the apparent change of attitude on the part of her husband.

Motion for new trial denied.

For Appellant: Waterman & Green-law.

For Appellee: Walling & Walling.

SUPERIOR COURT

Frank O. Taylor

vs.

Commercial Casualty
Insurance Co.

Law No. 52336

RESCRIPT

(February 15, 1922)

HAHN, J. This is an action of trespass on the case against an insurance company for weekly payments and allowance for a surgical operation due under the terms of the policy declared upon. A copy of the policy is made a part of the declaration. The matter is before the court on demurrer to the declaration, the demurrer setting out that it does not appear in and by said declaration that the statements in warranties made in the applications for the policy of insurance annexed to and made part of said declaration are true.

The plaintiff in his declaration alleges that he has always performed, fulfilled and kept all things on his part, according to the tenor and effect of the policy, and has sustained injuries entitling him to payments in the amounts set forth in the declaration.

Under the decisions in Whipple vs. United Fire Ins. Co., 20 R. I. 260, and Wells vs. Great Eastern Casualty Co., 40 R. I. 227, the above allegation in the declaration is sufficient, if proven, to entitle the plaintiff to recover.

Demurrer overruled.

For Plaintiff: C. A. Kelley.

For Defendant: Greenough, Easton & Cross.

Pen and Pencil Club to Honor Justice Capotosto, One of Its Members

Justice A. A. Capotosto of the Superior Court is to be tendered a complimentary banquet in the ball room of the Narragansett Hotel next Thursday evening by the Pen and Pencil Club of Rhode Island on the occasion of his recent elevation to the bench. Judge Capotosto has been an associate member of the Pen and Pencil Club, the newspaper men's organization, for several years and the board of governors of the club decided to honor him with a big dinner.

The arrangements for the event have not yet been perfected, but the daily newspapers will publish the details as soon as they have been completed. The affair will be informal and a reception, lasting half an hour, will precede the dinner, which is scheduled for 6:30 o'clock. Members of the bench and bar, business men, public officials and members of the Pen and Pencil Club will make up the gathering. It is estimated that about 300 will be at the dinner.

In addition to the brief addresses to be given, there will be several special features to enliven the affair, among which will be a gridiron stunt that will be put on by two of the cleverest wits in the State.

Members of the bar may procure tickets at \$3 each by forwarding a check to the office of the Rhode Island Law Record, 518 Howard Building, Providence, R. I., or from members of the club at the press room of the Superior Court House.



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No. 21

FEBRUARY 24, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Jury Trial Calendar

MONDAY, MARCH 6, 1922

50005 J P Brennan	Julian Wojciechowski vs Andrew H. DiOrto	J E Dooley
50756 P & S	Attleboro Braiding Co. vs Raymond Couter	Hart
51027 C & DeS	Joseph E. Raia vs G. F. Redmond & Co., Inc.	B & B
49301 G A Breden	Garabed G. Melidosian vs Jack Mooradian	H E & M
45200 F & M	James Edwards vs Wilbur D. Brown	W & W
51758 G E & C	Liugi Razza vs Alfred H. Williams	F L Hanley
52090 Q & Kernan	Marshall H. Fuller vs Catherine Hay	E M Sullivan
38936 S & L	Mary A. Gallagher vs Rhode Island Company	Williams
48792 P & DeP	Samuel Vova p. a. vs Dosithe Beaudel	J F Collins
40370 Remington	Noel Janelle vs Rhode Island Company	C Whipple

TUESDAY, MARCH 7, 1922

50744 Singen	William M. Brown vs The Smithfield Savings Bank	J Harris
50819 A & A	Philip Morisette vs John E. Pugh	Q & K
47626 P W Gardner	Valentine A. Frier vs Edwin E. Anthony	P V Marcus
47359 G M & H	Mandus Anderson vs Taxi M. & T. Co.	L B & McC
50184 F & H	Frank Whitworth vs Marshall D'Ambrosie	P & DeP
50183 F & H	Alice Whitworth p. a. vs Marshall D'Ambrosie	P & DeP
50479 J E B	Alfred Del Pape vs Albert Genati	P & DeP
52067 K H & F	Thomas F. Lennon vs Collins Brothers	Q & K
49374 T P Corcoran	Joseph E. Risk vs Sun Insurance Company	G H & A

WEDNESDAY, MARCH 8, 1922

50696 Grimes	Ellen Quinn vs Receiver of Rhode Island Company	Whipple-S
50819 A & A	Philip Morisette vs John E. Pugh	Q & K
51482 C & Canning	Frank Mossberg Co. vs Frank Mossberg	H C Curtis
50779 P S G & C	Frank J. Lee vs Williams & Merchant	P & Sherwood
51715 West-Conaty	Julia Hoye vs Mrs. Harry Warburton	J G Connolly
51754 Holton	Annie Kois vs John Zapac	
47987 F & H	Francis Parkhurst vs Revere Rubber Company	Gunn
50790 T L Carty	John M. Nolan vs Archie P. Goulais	W & W

THURSDAY, MARCH 9, 1922

49973 W S Flynn	Mary E. McCormick vs John C. Lyons	L & McD
44694 A G Chaffee	Wm. C. Johnson & Co. vs R. M. Mot. Trucking Co.	P & DeP
45221 F & H	Harold Hitchcock p. a. vs William H. Cooney	C & C
51251 P V Marcus	Josephine Dziekiewicz p. a. vs Ernest Clow	W & W
51766 Enos	John Gomes p. a. vs John Sears	Hennessey
43313 West	Rose Hannigan et al vs Peter A. Cruise	B & Connolly
51134 E G Carr	Ellen McGarty vs Annie M. Bryant	W & W
51135 E G Carr	Ellen McGarty vs George H. Bryant et al.	W & W

FRIDAY, MARCH 10, 1922

50706 R & H	Frank Petrussi vs N. Y., N. H. & H. R. R. Co.	Phillips
PA787 T & C	Anna R. Vaughn vs Jane E. Gardner	
51427 F & H	Henry F. McCabe vs Joseph Olney	W & W
51428 F & H	Henry F. McCabe vs Joseph Olney	W & W
51532 P S & C	Max M. Pulhman vs U. E. Railway Company	Whipple-E
47639 P & DeP	Michelina Paolina vs Antonio Caparco	McSoley
47628 McSoley	Maria A. Caparco vs Giacoma Paolino	P & DeP
52143 P C Joslin	Julius Manacopsky vs Max Mittleman	McG & S
52144 P C Joslin	Ida Manacopsky vs Max Mittleman	McG & S
50989 Stiness-M-B	D. Strauss Co., Inc. vs Mer. Tail. Trim. House	B & B

District Court Appeals Calendar

MONDAY, MARCH 6, 1922

50417 AS & AP J	Pawtucket Rendering Co. vs Catherine Hey, Ap.	Sal & Sal
50598 R & R	Stephen N. Sears vs A. Albanese & Co., Ap.	C & O'C
50104 A & A	Henry Goldstien Co. vs Samuel Dress, Ap.	
50845 McSoley	Joyce Bros. & Co. vs George Roberts, Ap.	J Bell
50871 Littlefield	Carlo Golato vs Nicola Golato, Ap.	P & DeP
50889 Slocum	Bermann & Dressler, Inc. vs Joseph Kulig, Ap.	Vance
50893 Salisbury-F	George W. Herbert vs Cornelius J. Hashouch	R & H
49756 E C S-M-B	Chas. A. Krause Milling Co., Ap. vs. Met. W. G. Co.	McG & S
46176 E C S	Standard Tire & Rubber Co. vs Samuel Waldman	H R Curtis
51655 McK & B	Joseph J. Burke vs O'Keefe Trucking Co., Ap.	J E Dooley
51675 I Horenstein	Albert J. Martin vs Elizabeth Cohan, Ap.	G F Troy
51683 C & O'C	Jas. W. Grosvenor vs Jas. H. Coleman, Ap.	J F Collins
51916 C & Ball	John E. Waterman vs Mabel E. Oegelman, Ap.	E Voight
50356 Brand	Nielser & Kittle Canning Co. vs Domenico DeLuglio	P & DeP
51090 P & DeP	Frank De Felice vs Giustino Fortolani et ux.	L V Jackvony
51967 H E & M	Sandy Olney, Ap. vs Francis De Luca, Ap.	Deft.
52219 J H Coen	Edward Alarie vs Elizabeth T. Garvey, Ap.	C & Cooney
40613 P C Joslin	Union Charcoal Co. vs Vincenzo Sion, Ap.	Vencziale
51535 C S Slocum	Hyman Mitchell, Ap. vs William J. McCarthy, D. S.	B & B

TUESDAY, MARCH 7, 1922

50555 W M P B	Rosario Imbruglio vs Francesco Ciamfarano, Ap.	J A Lee
50582 R & R	Blazer Brothers vs David H. Orbeck, Ap.	J Smith
50837 W M P B	James E. Catrell vs U. S. Bottling Co., Ap.	L V Jackvony
50872 McSoley	Michael Bauer, Inc. vs Thomas A. Meade	P & DeP
50903 Ziegler-K	Atlantic Tubing Co., Ap. vs R. I. Company	Whipple-S
50914 Slocum	Manhattan W. G. Co. vs I. Goldstein, Ap.	Nathanson
51079 Semenoff	Summerfield & Co., Inc. vs Mrs. Sofia M. Volla, Ap.	P & DeP
51115 Littlefield	George E. Sherman vs Chas. W. C. MacDougall, Ap.	Breaden
51306 B & B	Josephine Ciatana vs Manuel Medeiros, alias	Q & McK
51334 T M B	Prov. Buick Co., Ap. vs William H. Joslin	A G Chaffee
51613 C S Slocum	Israel Chernick vs J. M. Gibbons, Ap.	D M & M G
49570 L Semonoff	Mathews Roofing Co. vs John Pettine, Ap.	J Veneziale
50927 G N Bennett	Harvey Lafrance vs M. Santosuosso, Ap.	
51920 Brand	Cornelius B. Williams vs John Worthington, Ap.	F & H
50581 Stiness	Belcher & Loomis Hdw. Co., Ap. vs Robbio Elec. Co.	Wildes
52165 Horenstein	Shea Large vs Louis Rhian, Ap.	R & R
52147 Osterman	Mevianno J. Santos, Ap. vs Horace Minkler	Dorney
52233 Brand	Nat. W'sale Gr. C., R. I. vs Vittorio Fortunato, Ap.	McK & B
52514 S Nathanson	Charles Wojtowicz vs Union Liberty Co., Ap.	J T Bannon
52486 E C Stiness	Belcher & Loomis H. Co. vs W. H. Walker, Jr., Ap.	D Colton
52293 Stiness	Art League vs Sampson Auto Top Equip, Ap.	P Marcus
49447 P & DeP	George A. Combe, Ap. vs C. E. Wilkinson	T J Dorney
49495 Stiness	Gayuga Linen & Cot. Mills vs East. Broom, Ap.	Osterman
52579 McGauley	Joseph Heron vs Oliver A. Blair, Ap.	F J D

WEDNESDAY, MARCH 8, 1922

50589 R & R	S. E. Berman Leather Co., Ap. vs Jacob Feinstein	Joslin
46154 C R Easton	Antonia Strongoli vs Rhode Island Company	Eklund
45733 A & A	Enterprise Music Sup. Co., Ap. vs Charles V. Gross	P & DeP
50803 Costello	Century Furn. Co., Ap. vs Slefkin & Horowitz	Helford
50942 Slocum	Federal Truck Sales Co. vs David P. Morris, Ap.	McK & B
51302 R & R	Jacob Teatti vs Matteo Pazza, Ap.	Romano
47426 A & A	John Petras vs M. Daly, Ap.	J C Cawley
49786 E C S-M-B	Phillips Jones Corp., Ap. vs S Finn	T P Corcoran
51534 McSoley	L'Independent Pub. Co. vs Robert F. Griffeth, Ap.	J A Hammill
51578 E C Stiness	Partola Mfg. Co., Ap. vs Mt. Hope Dist. Co.	C Z A-M G&S
51662 C S Slocum	H. C. Anderson vs David Orleck, Ap.	J Smith
48186 Stiness-M-B	Steiner Mfg. Co., Ap. vs Benedetto Zinno	Easton
51720 B & B	Gennaro Manfredo vs Angelo Del Santo, Ap.	McSoley
51508 T F Vance	Patrick F. Finnerty vs Benj. J. Dyer, Ap.	R J McMahon
51811 L Semenoff	Pawtuxet Mills vs Ralph Borraoi, Ap.	P & DeP
50039 Brand	Nielson & Kittle vs Gennaro S. Unocato, Ap.	P & DeP
42445 Stiness-M-B	Christman Piano Co., Ap. vs Thomas Kennedy	J J Lace
50590 J H Coen	John Olinski vs Joseph F. Cullen, Ap.	Duffy
50591 J H Coen	John Olinski vs James E. Halkyard	Duffy
50031 R & R	George Buck vs Frank Buffoni, Ap.	P & DeP
52359 J G LeC	J. Thomas Johnson vs Nathan Selengut, Ap.	R G B

THURSDAY, MARCH 9, 1922

50574 R & R	Stephen S. Arnold vs Edgar Hollindrake, Ap.	Reddy
50843 AS&AP J	Fred O. Gardiner vs Bernan & Dressler, Ap.	I Marcus-J
50945 Sullivan	Everett F. Taylor p. a. vs Philip Block et al., Ap.	MacLeod
50946 Sullivan	Margaret Taylor vs Philip Block et al., Ap.	MacLeod
49480 Alexander	Louis Rozefsky et al. vs Benjamin Braustein, Ap.	B & B
49774 E C S-M-B	Charles J. Jager Co., Ap. vs Jesse Silva	J S Neves
51558 R & R	Providence Mfg. Co. vs Siman Shiner	B & B
51577 E C Stiness	Outlet Co., Ap. vs Henry R. M. Dutton	H A Clason
50553 W Prescott	Charles W. Frasier, Ap. vs Edw F. McKenna	G F Troy
49851 Stiness-M-B	Apcra Mfg. Co., Ap. vs Millers, Inc.	Wildes
52101 L V Jackvony	Antonio Morroni, Ap. vs Louis Gerardi	T H Holton
48828 T L Carty	Patrick Roch vs Joseph F. Sutton, Ap.	E R Walsh
51652 R G E Hicks	Nathan Sallinger vs Edgar A. Charbourne, Ap.	P E Dillon
49737 J. Veneziale	Mario Fecocelli vs Francesco DeAngelis, Ap.	B Cianciarula

FRIDAY, MARCH 10, 1922

50462 Stiness-M-B	Geo. Tomlinson & Son, Inc., Ap. vs John F. Lennon	A G Chaffee
50575 R & R	Fair Merchandise Co., vs M. M. Stone, Ap.	Pro se ipso
50884 AS & AP J	American Paper Box Co. vs Hassenfeld Bros., Ap.	R & R
51082 Slocum	Union Paper Co. vs A. Langelier, Ap.	B Cianciarulo
51340 D A Colton	Frank Roberts vs Weaver & Wood, Ap.	R Barnfield
51596 McSoley	Jos. P. Gould vs Samuel Gardensten, Ap.	J Venziale
51663 C S Slocum	Albert F. Justin vs George H. Armitage, Ap.	S K & S
50377 Stiness-M-B	Bairakkar Z. Husian vs A. B. Keljikian Co.	J Rustigian
52023 Stiness	John H. Leary, Ap. vs Dexter Paine	B & Connolly
49245 Finklestein	E. G. Spooner vs A. B. Mfg. Co., Ap.	Stiness-M-B
52301 Alexander	Standard Grocery Co. vs Geo. Berman, Ap.	Joslin
52351 L B & McC	Adelard Plante, Jr. vs G. Clifford Howard, Ap.	Flynn
48969 P & DeP	William Williams vs Adolphus Falorini, Ap.	L V Jackvony
50105 C R E	Daniel Kitchen vs John Broadman, Ap.	M G & S
50368 C R E	Daniel Kitchen vs John Broadman, Ap.	M G & S
50922 C R E	Daniel Kitchen vs John Broadman, Ap.	M G & S

SUPREME COURT

Standard Machinery Co.)
 vs.) Ex.&c.No. 5488
 William H. Paeth)

(Before Blodgett, J., Below)

RESCRIPT

February 20, 1922

This is an action of assumption and after verdict for the plaintiff the defendant made a motion for a new trial upon the grounds that the verdict was against the law and the evidence and the weight thereof. The trial justice denied this motion and the defendant then duly brought the case to this court

upon his claim of exceptions. The exceptions are to the effect that the verdict is again the law and the evidence and that the jury misunderstood the issue.

This action is brought to recover compensation for machine work on brass castings for carburetors. In September, 1916, the defendant was superintendent of a department in the Gorham Manufacturing Company, and this company made the castings for a carburetor. It was necessary to have these castings machined and fitted and Mr. Upton and the defendant called upon Mr. Murphy,

manager of the plaintiff company, to see about having this work done. As a result of the conference between these three men, the plaintiff undertook to and did perform the work agreed upon, and the sole issue in this case is whether the defendant, Paeth, agreed to pay for the work.

Mr. Murphy testified that he first met Mr. Paeth in connection with some work that the plaintiff was doing for the Gorham Manufacturing Company and that while this work was in process the defendant and Mr. Upton called upon him. The defendant said that he had some work he wished done on his personal account in finishing brass castings for carburetors, and Mr. Murphy replied that he would be glad to do the work. He testified that credit was given to Mr. Paeth and that he knew nothing of the financial condition of the Upton Carburetor Company.

It appeared in evidence that the carburetors were delivered to the defendant and that the first invoice of \$400.00 was made out to the Upton Carburetor Company and given to Mr. Paeth. Mr. Paeth paid this invoice partly by a check of the Gorham Manufacturing Company and the balance in cash.

Mr. Murphy testified that the making of this invoice to the Upton Carburetor Company instead of to Mr. Paeth was the mistake of a clerk, which was immediately rectified so that subsequent invoices were made to Mr. Paeth; and it appeared in evidence that Mr. Paeth paid some money on account of these subsequent invoices.

The defendant testified that when the agreement was made with Mr. Murphy for the machine work on the carburetors Mr. Murphy asked him if the bill was to be sent to the Gorham Manufacturing

Company and he replied, "No, this is an Upton Carburetor Company contract." He also testified that the first was rendered to the Upton Carburetor Company and that he paid it with money received from this company.

He further testified that when the invoice was made out against him personally he objected, and that soon after this time he made an arrangement with Mr. Murphy by which he was to take out finished carburetors and pay \$25.00 for each one taken out in order to liquidate the account, and that several carburetors were taken and paid for under this arrangement.

The plaintiff introduced several letters from the defendant wherein he apologized for the delay in the payment of the account. These letters were written by the defendant after repeated demands had been made upon him for payment of the account. In one of these letters, under date of February 6, 1918, the defendant stated, "Owing to my being at Washington, D. C., a great portion of the past five weeks, I have been unable to clean up the Upton Carburetor account. However, I have practically made arrangements with a fire of Middleboro. Mass., to take over this matter, and one of the stipulations is the payment of your account, and this should be settled next week without fail in full. As I am anxious to send them an instrument, I am enclosing herewith \$25.00 in payment for one. Kindly let bearer have one instrument which will be highly appreciated. I regret very much the long delay in getting the account settled, but wish to assure you that I will leave nothing undone in order to settle the same. If by any chance the arrangement hoped for does not go through on

Saturday I should personally be able to consummate the account about March 15, as then I have due me an outstanding amount of \$2500.00 which is then collectible."

February 13, 1918, the plaintiff wrote a letter to the defendant in which it was stated, "Statement covering your account was mailed to you yesterday and we are very glad to learn that you will be bale to clean up the entire account by the end of this week." The next day the defendant replied to this letter by writing, "Your favor of the 13th instant received, and the writer wishes to express his gratitude for the friendly tone evidenced therein. The arrangements which I wrote you of last week is progressing favorably, and I have hopes of making final arrangement whereby a settlement with your concern can be made this week—if not, in a very short time."

The trial justice said in his rescript, "Upon the whole record there was evidence upon which the jury might base a verdict for the plaintiff upon the broad issue that the plaintiff never looked to the Upton Carburetor Company for payment of this account, and did from the beginning contract with and expect defendant to pay said account, and that plaintiff extended credit to the defendant solely."

In the letters written by the defendant to the plaintiff he does not disclaim personal liability for the account and these letters, in connection with the other evidence in the case, were sufficient to require the jury to return a verdict for the plaintiff.

The defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter

judgment for the plaintiff upon the verdict.

For Plaintiff: E. C. Stiness, Daniel H. Morrissey and Christopher Brennan.

For Defendant: Peter M. O'Reilley.

SUPREME COURT

John A. Fritz et als.

vs.

Walter A. Presbrey
et als.

No. 539

Equity

Patrick Louis Monahan
et als.

vs.

Walter A. Presbrey
et als.

No. 540

Equity

RESCRIPT

The above entitled causes are before this court upon the respondents' motion to stay the execution of the decrees of the Superior Court, granting preliminary injunctions, pending respondents' appeals.

The court recognizes the legal presumption in favor of the propriety of the legislative action of the Providence City Council. From what has been made to appear to us by the respondents, however, a majority of the court are of the opinion that considerations of public welfare are not so pressing in this case as to require the summary interposition of the court at this time before the appeal can be heard in accordance with the regular procedure prescribed by statute for the consideration of an appeal from a decree for temporary injunction.

The motion for stay is denied, on condition that the complainants consent to proceed with a hearing of the appeals on Tuesday, March 7, 1922, at 10 o'clock a. m.

For Complainants: Albert West and A. V. Pettine.

For Respondents: Oscar W. Heltzen.



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No. 22

MARCH 3, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

(Monday, March 6, the Motion Calendar Is Called)
REGULAR CALENDAR

MONDAY, MARCH 6, 1922

Ex5448 J J M-P&D	A. H. Burns, Sr., et al. vs W. Brightman et al.	W & G
MP374 E H Z	James H. Brown vs The Soldiers' Bonus Board	
Ex5664 L & M	Swinehart Tire & Rubber Co. vs B'dway Tire Ex.	F H W
Ex5576 C R E	L. Deacutes vs Ginlio De Fiore et al.	J F M
Ex5571 JBL-LVJ	Carlo Golato vs G. A. Mercurio	P & D
Ex5570 P & D	W. Roy vs Levi J. Roy	Cooney & C

TUESDAY, MARCH 7, 1922

Eq539 A B W	J. A. Fritz et al. vs W. A. Presbrey	City Solicitor
Eq540 A B W	P. L. Monahan et al. vs W. A. Presbrey	City Solicitor

WEDNESDAY, MARCH 8, 1922

Ex5479 C P S	State vs E. Romano	P & DeP
Ex5460 M D C	M. Dunlavey vs William Taber	C C & M
Ex5540 M & C	W. G. English vs T. F. Keeher	M L
Ex5556 A A C	State vs R. G. Adams	G R M
Ex5553 H E & M	H. M. A. Hathaway vs C. F. Reynolds	B W G
Ex5547 J L C	A. Grande vs Eagle Brewing Company	M & S

FRIDAY, MARCH 10, 1922

Ex5579 W & G	J. F. Congdon vs L. H. Block	C & C
Ex5568 A G C	J. M. Giblin vs Dudley Hardware Co.	G H & A
Ex5561 L H S	F. Seltzer vs Joseph Greene	R & R
Ex5562 R & R	J. Greene vs Fannie Seltzer	L H S
Ex5548 ECS-DHM	B. F. Goodrich Rub. Co. vs Millers, Inc.	F H W

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MARCH 6, 1922

49157 W A G	G. H. O'Brien vs F. W. Wallace
Eq5738 Gallagher	R. O'Gorman, Jr. vs R. O'Gorman, Jr., Co.

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Pet.338 T F F	M. How vs Textile Finishing Company	
52369 W & G	Lidia C. Daneker vs Nor. Mut. Life Ins. Co.	G H & A
52370 W & G	Lidia C. Daneker vs Aetna Life Ins. Co.	
51718 P & DeP	G. Marsello vs Norton Taxi Motor Co. et al.	L B & McC
Eq5708 McG & S	A. J. Zura vs Biltmore Shop, Inc.	
50237 Rickard	Alsace Worsted Co. vs Adams Express Co.	G H & A

TUESDAY, MARCH 7, 1922

JTW50454 M & T	Am. Cotton Oil Co. vs Narr. Dairy Co., Ltd.	W C & C
Eq5326 P W G	S. E. Clafin vs Robt. McLaughlin	J P B
Eq5575 P & DeP	M. Armieda vs M. Medeiros	S & McK
Eq5731 B & B	Sterling Glover vs Sarah Glover	
52258 G K & G	A. I. Darman vs Hyman Balenson	J R H
Eq5739 Connolly	Matthew Kenney vs Bernard J. Kenney	
Eq4628 P & DeP	G. Restino vs Orazio Tafuri	
Kent L B & McC	L. A. Haviland vs Emma V. Allen	L A N
Eq5254 McG & S	R. B. Deware vs Ind. Chem. Co.	W & G
50525 E C S-M	Warren Ref. & Chem. Co. vs Fife's Garage	K H & F
51162 E L J	Phileas Auger vs Sun Ins. Company	T M O'R
Eq5630 Cooney & C	A. M. Polleys vs O. Armore	
Eq5091 McG&S-B&B	D. Basile vs Vincent Caldedo	
Eq5320 C C & McCJ	M. Anderson vs A. E. Johnson et al.	McG & S
Eq5742 R & H	John Baldwin et al vs George F. Flaherty Co.	

WEDNESDAY, MARCH 8, 1922

PA741 P & DeP	S. Carcieri vs M. D. Mazzerille	Jackvony
Eq5113 E C S-M	Contreville Mfg. Co. vs Oswego Textile Co.	C M B L
Eq5737 Ziegler-F	F. Grabble et al vs Mary A. Howard	
Eq5306 E & A	Sullivan Ballou vs The American Wringer Co.	
Eq5660 A B W	Beatrice W. Weinbaum vs J. M. Weinbaum	McG & S
Eq5744 Lee & McC	Roy F. Wilkins vs F. B. Wilkins	

Jury Trial Calendar

MONDAY, MARCH 13, 1922

50502 Cianciarulo	Anthony Ciani vs United Wire & Supply Co.	F A Jones
51214 J C Brennan	Bernard W. Leddy vs Pawtucket Gas Company	P & S
47934 P C Joslin-J	Providence Live Poultry Co. vs M. Alice Sprague	L F Murphy
48853 W & W	Thomas F. Randall vs Antonio Faillace et al.	M A S
51691 M & W	Harrison B. Hill vs Nathan Selengut, alias	R T B
51543 O'Neill	Bernard Thompson, p. a. vs John Delberian	J R
46358 Cianciarulo	Guisepppe Pennachio vs Antonio Currer:	P & DeP
43864 T Corcoran	Robert M. Cohen vs Rhode Island Company	Sweeney

TUESDAY, MARCH 14, 1922

51002 G A B	Thomas H. Ray vs Mary J. Sterns	F & H
42505 A B West	James A. Berrigan p. a. vs Adelaïd H. Payette	A & A
49787 T L Carty	Joseph Atwan vs Alfred S. Bessette	F & H
47970 L H S	Emma Holsey vs George B. Calder	A G C
51543 O'Neill	Bernard Thompson, p. a. vs John Delberian	J R
49394 West	Nathan Pollack vs Sharrette Motor Corps of R. I.	
37993 Veneziale	Francesco Marsella vs Attilid Simonelli	P Romano
48750 C S Slocum	John Tutalo vs Joseph L. Flurant	E J D
49293 P & DeP	Teresa Izzi vs Fay's Theatre	L & M
49294 P & DeP	John Izzi vs Fay's Theatre	L & M
48752 Finklestein	Irene Poulos vs Peter Souliman	McG & S
39868 C & Cooney	Feliz Dzikiowski vs Rhode Island Company	C Whipple

WEDNESDAY, MARCH 15, 1922

50781 P & DeP	Edward Panniccia, p. a. vs W. M. Bosworth	Nolan
50783 P & DeP	Joseph Panniccia, p. a. vs W. M. Bosworth	

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50751 Kelley	Margaret Brennan vs George C. Hervey	S & S
51004 McG & S	Benjamin F. Whitman et al. vs Cenedella Co., Inc.	P & DeP
51815 West-C	Claus O'Johnson vs Thomson-Starrett Co.	
51941 Grimes	Nishan Pakradoonian vs United Elec Railway Co.	W
51942 Grimes	Nishan Pakradoonian vs Thomas Appleton	J Harris
51294 R & R	Wilfred H. Beaulieu vs Luigi Palumbo et al.	Pettine
52183 Joslin-M	Joseph Regan, p. a. vs Jenckes Soinning Co.	P & S
52315 E S Chace	M. J. Cummings, O. P. vs Alex. W. McDonald et al.	C & H

THURSDAY, MARCH 16, 1922

51190 J H Coen	Daniel Smith vs John Marshall	H Carpenter
49213 LeCount	Edward B. Jenkins vs Lloyd M. Sweet	E S Chace
49658 L B & McC	William J. Feeley Company vs Blacker Bros.	P V Marcus
51772 Conaty	E. M. Kenney vs John A. Monahan	C A W
46659 P & DeP	Donato De Palma et ux. vs Fred J. Martel et al.	J Connolly
51633 P Romano	Angelo Lucchetti vs Lenna Zetlin	R T B
51634 P Romano	Pierto Signore vs Lenna Zetlin	R T B
46800 H E & M	Henry Rousseau vs G. de Werthemere	Stiness-M-B
51465 F & H	Henry P. Ryder vs Wunsch & Schwartz	R & R
51259 P & DeP	Cosmopolitan Trust Company vs John Tutalo	Cianciraulo

FRIDAY, MARCH 17, 1922

49134 R & R	Manuel Costa vs Michael Palino	C & DeS
49135 R & R	Joseph Bart vs Michael Palino	C & DeS
50310 J Bell	Jonathan Andrews vs Pasquale Squillante	P & DeP
51829 Pettine	Erminio Colletti vs Nicola Gizzarelli	Veneziale
49290 H E & M	Lillian B. Atwood vs Harry Coy	P & DeP
50165 W Prescott	Charles N. Rollins vs Frank H. Swan et als.	C Whipple
50157 W Prescott	Ethel M. Rollins vs Frank H. Swan et als.	C Whipple
43546 Glendinning	Charles J. Duby vs Ruth Mathewson	F H Wildes
52208 E D Higgins	Helen M. Dixon vs Arthur Deslaurier	J F L
50235 A & A	Julien Couchie vs George Bush	R & R

District Court Appeals Calendar

MONDAY, MARCH 13, 1922

50559 R & R	Harry Kletzner vs William A. David, Ap.	C J O'Connor
50609 W & W	John A. Hassett vs Carmelo Germano, Ap.	J F Lavender
51084 Slocum	Fred Morin & Co. vs Leo Glass, Ap.	Joslin, I M
51284 Singsen	Howard R. Lord Co., Inc. vs Peter Grasso, Ap.	Jackvony
49496 W C & C	Harrie L. Fales vs Benj. B. Manchester, Ap.	J J Rosenfeld
51669 C S Slocum	Lightning Battery Service vs T. J. Hayer, Ap.	P E Dillon
51682 ECS-MB	Pike Mfg. Co. Ap. vs William F. Almy Co.	T M O'R
52234 Coen	M. S. Shagehian & Co., Inc., Ap. vs Oscar B. Wicky	B & Gorman
47283 G Bennett	Magrditch M. Karian, Ap. vs Prov. Cab. Co., et al.	T A Jenckes
51598 P Romano	Vincenzo Vecario vs Amedeo Narducci, Ap.	J Veneziaie
49555 P & DeP	Enrico Almonti vs Burt Sterns, Ap.	Wildes
50468 Stiness-M-B	Pettingell-Andrews Co., Ap. vs James J. Whalen	Costello
52300 B & B	Simon Klein vs George Berman, Ap.	Joslin
50947 J Brennan	Matthew J. Gallagher vs John Corcoran, Ap.	T L Carty
51943 J Harlow	Manuel Coreia, Ap. vs Greyhound Motors Corp.	Stiness-M

TUESDAY, MARCH 14, 1922

50544 R & R	Louis Kravety vs Baffoni Brothers, Ap.	P & DeP
50445 R & R	Louis Kravety vs Baffoni Brothers, Ap.	P & DeP
47231 R & H	Joseph A. Hagan vs Nelly I. F. Eddy	C & C
50879 R & R	Ralph P. Levy, Ap. vs Chester W. Kelly	C & B-G
50880 R & R	Ralph P. Levy, Ap. vs Chester W. Kelly	C & B-G
51095 Slocum	Rosenblatt G. Co., Inc. vs Wm. A. Tyron & Co., Ap.	I Marcus
51517 E C S-M	Shoe & Lea. Reporter Co. Ap. vs Kescot Mfg. Co.	G M & H
51670 C S Slocum	Met. Wholesale Groc. vs Solomon Quartz	R & R
51681 W H McS	Michaels Bauer, Inc. vs H. La France, Ap.	G W B
49064 F & H	John F. McBurney vs John Tropino, Ap.	R & R
51852 B & B	Agnes G. Goldberg vs John Keyes et al., Ap.	E R Walsh
51914 B & B	Agnes G. Goldberg vs John Keyes et al., Ap.	E R Walsh
51972 P & DeP	Jemal Siliman, Ap. vs Murat Mustafa	R & R
52168 Ziegler	Thomas S. Pine vs Katherine Perkins, Ap.	Griffin
46910 P & DeP	Luigi Marcello vs Star Dye House, Ap.	J Rustigian
50992 R J McM	William J. Farnum vs John J. Lee	C M B & L
49785 W J B	Jonathan Waterson, Ap. vs Joseph A. Bonin et ux.	F & H
47783 M H & G	John J. Hartigan vs Timothy E. Hartigan, Ap.	Q & McK

WEDNESDAY, MARCH 15, 1922

44366 C R Easton	Horace M. Williams vs Everett Forestry Co., Ap.	I Marcus
50859 AS & AP J	Direct Rubber Co. vs Laura Brothers, Ap.	Corcoran
51096 C S Slocum	Ed. Wilkinson & Co. vs T. F. Hunt Mfg. Co., Ap.	Bowen
51314 Slockett, Jr.	Gustave Annis vs George W. Crafford	Grimes-C
51564 E C Stiness	Henry Pape & Co., Ap. vs L. Pepper	J F L
50548 S K & S	Francis E. Righ vs Nicandro Ricci, Ap.	Cianciarulo
50549 C & DeS	Nicandio Ricci, Ap. vs Francis E. Righ	S K & S
52227 W C & C	Charles Brown, Ap. vs Morris Levine et al.	McSoley
52235 Q & McK	Frank Amaral et al. vs John Silva, Ap.	Count
50542 McG & S	Maurice Greenwald et al. vs Dave Sundlum, Ap.	R & R
44744 Stiness	Leonard Krower & Son, Ap. vs S. K. Merrill Co.	L B & McC
52295 Horenstein	S. J. Dickerson vs William J. Wood, Ap.	Vance
49783 M Costello	John Manning vs Frank L. Backus, Ap.	J Ousley
49784 M Costello	John B. Manning vs Frank L. Backus	J Ousley
52108 L B & McC	Roberts & Oake of N. E., Inc., vs F. A. Marsden, Ap.	G A Breden

THURSDAY, MARCH 16, 1922

50032 R & H	Daniel T. Hagan vs American Ry. Express Co.	G H & A
50890 L B & McC	Maurice A. Gold vs Solomon Swartz, Ap.	G E & C
51097 Slocum	Rosenblat Gl. Co., Inc. vs A. Jackvony et ux., Ap.	L Jackvony
51098 Slocum	Rosenblatt Glass Co., Inc. vs Mitchell, Ap.	B & B

51148 M Costello	Pioneer Ribbon Works vs L. W. Bishop Co., Ap.	J E Brennan
51317 Gunning	John J. Larkin et al. vs Arthur A. Sullivan, Ap.	McManus
51605 E C Stiness	Starkweather & Shepley vs Louis M. Berman	W Prescott
52044 C J O'Connor	James A. McAvenia vs Susan E. Clafin, Ap.	P W Gardner
49746 P Romano	Vincenzo Di Tomasso vs Germaro De Corpo	B & B
50318 Stiness-M-B	Shapiro Candy Mfg. Co., Ap. vs Katz Bros.	S Helford
52226 B & C	Union Leather Co. vs Barney Potter, Ap.	J T Witherow
52225 B & C	A. Bass & Son vs Barney Potter, Ap.	J Witherow
48377 P C Cannon	Jonas Brook vs William McDonough, Ap.	W Osterman

FRIDAY, MARCH 17, 1922

45372 R & H	Nicola Piccirillo, Ap. vs William Levenson	R & R
51050 L B & McC	Biddle Purchasing Co., Ap. vs Miller, Inc.	Wildes
51280 G H & A	Cowell's Furniture Co. vs H. G. Hall, alias Ap.	J Clifford
51659 Remington	Idella E. Follett vs Cornelius Moran, Ap.	W Prescott
50034 Atwood	Gulf Refining Co. vs John T. Goggin, Ap.	C & C
51020 C C R	Marion G. Dwight vs Mary A. Moan et al.	McSoley
50298 W R P	Pracentino Deconcilus vs Maria L. Gurriero, Ap.	J L C
51585 McCanna	Norton's Garage vs Harry Bachrach, Ap.	R & R
52292 G K & G	W. B. S. Whaley, Jr. vs W. P. Hamblin, Inc.	G E & C
51579 McCanna	Morrin Wiesel vs Frank D. Pettit, Ap.	C R Easton

SUPERIOR COURT

Parks Brothers &
Rogers, Inc.

} Eq. No. 5734

Joseph E. Miller, Inc.

RESCRIPT

March 1, 1922

TANNER, P. J. This is a bill in equity and is heard upon motion for preliminary injunction.

The complainant has for many years made a collar button of a particular style and design, and the respondent has been for several years making a collar button, which in size, shape, design and operation is an exact copy of the complainant's button.

The bill alleges that complainant's collar buttons have become well known to the trade and purchasing public and are recognized and identified as the goods of complainant by distinctive features devised by the complainant.

The bill also alleges that it is unfair competition for the respondent to make and sell a collar button with a design which is an exact copy in size and all other particulars of that of the com-

plainant. The bill is sworn to and used as an affidavit in the case.

We think it is highly probable that a collar button of such distinctive design and operation sold for many years would acquire a secondary meaning as a product of a particular manufacturer. The affidavit of the bill is to this effect, and the evidence of the complainant that retailers displayed respondent's collar buttons upon the complainant's cards and alongside of the complainant's buttons tends to strengthen this view.

Perhaps the main defence urged upon us is that the particulars of design in which the respondent imitates the complainant's button are functional, and therefore open to competition. One of these features is the tongue of the button which snaps down with a spring upon the disk of the button and holds the collar to the collar band; also the convex groove which starts at one side of the base of the tongue and runs parallel to the periphery of the disk of the button around the surface of the inner plate of the button back to the other side of the base of the tongue.

While it is true that a tongue is operative and is a functional part of the but-

ton and that the convex groove referred to may also be a functional or structural part of the button, it is not at all necessary to the functional or structural use of the tongue and groove that in design they should be both in form and dimensions an exact copy of the complainant's button. In size and design, therefore, they are non-functional, and when we find such an absolutely exact copy by the respondent of the complainant's button in shape, design and size, we can not help feeling that it was so intended for a purpose of unfair competition.

Our attention is particularly called to the case of Shredded Wheat Company vs. Humphrey, Cornell Company, 215 Fed. Rep. 960. While the court in that case concludes that variation as to form, color or size could not be imposed upon the defendant, it nevertheless does hold that some distinguishing mark should be so imposed. The reason why a change of design was not imposed was because, as we understand it, the plaintiff had dedicated his design to the public by the failure to claim it in his patent application. That is not the case here.

As to color, it was felt that "to compel a different shade of brown in baking would render the biscuit so distasteful as to hopelessly cripple competition."

As to size, it was considered too detrimental to fair competition because "to increase the size would make it impossible to get two in the ordinary saucer and to decrease it would too greatly increase the price of manufacture."

In the case at bar there is no suggestion of changing the size, but only the shape of the tongue and groove. We think, therefore, this case does not govern the case at bar.

We see no reason why the tongue and groove can not be so modified in design as to make the respondent's button dissimilar in appearance to the complain-

ant's while retaining all necessary structural and functional features. If we did not think this, we could still in accordance with the case cited require the placing upon the respondent's button of a mark which would sufficiently distinguish it from the complainant's. We think this, too, could easily be done without affecting the functional features of the button or without increasing the cost of manufacture so as to affect fair competition. There is no evidence that such was the case here.

For these reasons we think that the complainant is entitled to a decree imposing upon the respondent the duty of making its button so dissimilar in the features of its design of a tongue and groove as to be dissimilar in appearance from the complainant's button.

For Complainant: Curran & Hart.

For Respondent: Philip V. Marcus.

SUPERIOR COURT

Paul Mortikirian
vs.
William C. Toner
et al. } No. 51188

RESCRIPT

February 23, 1922

TANNER, P. J. This is an action for breach of covenant of seisin on the sale of real estate.

Heard upon defendants' demurrer to plaintiff's second amended declaration.

The land involved is described as "also that certain parcel bounding northerly on above described tract of land and containing about 2541 square feet of land," and plaintiff averred that when said indenture was made by said defendants and delivered to said plaintiff said certain parcel of land bounding northerly on above described tract and containing about 2541 square feet of land was definitely ascertained by survey and said

defendants owned no other land of such description.

The first ground of demurrer is that the description of the second parcel of land alleged to have been granted is patently ambiguous and void.

The reasons already given by us in our rescript upon the prior declaration are sufficient for the consideration of this ground of demurrer.

Demurrer on this point overruled.

Second ground: The description of the second parcel of land alleged to have been granted is indefinite and in terms negatives the precision of description legally necessary to identify any parcel of land. We understand this demurrer to refer to the fact that the number of square feet is designated as about 2541.

Because of what we have already said we do not consider it a good ground for demurrer. If there was only one ascertained piece of land which would answer the description and which was owned by defendant, the allegations are sufficiently definite.

Demurrer overruled.

Third: It does not appear that the alleged survey was in writing, or signed by the defendants, or by anyone in their behalf thereunto duly authorized, as required by the statute of frauds.

Fourth: It does not appear that the survey alleged was incorporated by reference or otherwise in the alleged covenant.

These two grounds of demurrer have reference to the parol evidence rule. In support of that it was argued that even if a description contained in a deed could be made more definite by parol evidence

for the purpose of a real action, this rule would not apply to an action of covenant.

Upon consideration we see no reason why the rule should be any different with reference to an action of covenant than upon an action of ejectment on a deed. Either case involves the question of allowing parol evidence to identify the subject of a sealed instrument.

Defendants cite cases where it was held necessary to reform a deed before an action of covenant could be sustained, but those were cases where the description conveyed a different piece of property from the one intended to be conveyed. It is quite different from a case where there is no mistake as to the identity of the land intended to be conveyed, but it is necessary to identify the land by parol evidence.

"The modern principle is that the words of the document are nothing but indices to extrinsic things and that therefore, all the circumstances must be considered which go to make clear the sense of words, that is, their association with things."

4 Wigmore on Evidence, p. 3499 (3).

We think, however, as we stated at the hearing, that the declaration is demurrable upon a ground which might come within the fourth ground of demurrer, although not so argued. That is, we think that when it is stated that it can be shown by parol that there was a definitely ascertained piece of land belonging to the grantor and answering the description of the deed, that it was also the only piece of land so described owned by the grantor, a description of this piece by metes and bounds should be incorporated in the declaration.

On this ground we think that the demurrer should be sustained.

For Plaintiff: George W. Bennett.
For Defendants: Joseph C. Cawley.

SUPERIOR COURT

Victoria Ilczysz }
 vs. } No. 38574
 Jacob Moatecki }

RESCRIPT

February 23, 1922

BLODGETT, J. Heard upon motion for new trial after verdict for plaintiff for \$1700.

Case tried in Woonsocket. This is the second trial, the first resulting in a verdict for plaintiff for \$1750.

The alleged assault upon which the action is based occurred while the employee of the defendant was delivering goods from a delivery wagon, a butcher's cart, used in defendant's business.

The testimony disclosed that the servant while engaged in the master's business, stopped his cart by the entrance of a tenement house in which the plaintiff was one of several tenants. The plaintiff objected to the cart remaining there and attempted to move the horse away. The alleged assault occurred during this proceeding and the evidence is contradictory as to what happened.

The servant contends that the assault, if any, happened while he was engaged in protecting the property of the master, and happened while the plaintiff and her husband were making an assault upon him.

The serious question in this case, aside from the amount of the verdict, is as to whether the alleged acts of the servant were within the scope of his em-

ployment. If he were justified in using force to protect the property of the master, such force must have been used while plaintiff was unjustifiably interfering with the master's property, or the servant had good reason to think so. If the alleged assault occurred after the horse had been moved by plaintiff, and during an independent altercation between the servant and the plaintiff, then the master could not be held liable, and if such assault occurred while the servant was properly engaged in the defense of his master's property, the master could not be held liable. Upon the questions the evidence is almost hopelessly contradictory, and much of that given by plaintiff and her husband physically unreasonable, but from the mass of contradictions and unreasonable testimony the facts were laid before the jury for its determination by the court, and the verdict was that the assault did occur, and was made while the servant was engaged in his master's business.

While the court might have come to a different conclusion on this issue, yet there were facts laid before the jury which, if believed, would justify a verdict for the plaintiff, and the court does not feel that it can interfere in such verdict.

As to the amount, two juries having assessed damages in practically the same amount, the court does not feel that it can say the amount is so large as to warrant its interference.

Motion denied.

For Plaintiff: J. H. Rickard.

For Defendant: A. H. O. Boudreau.



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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 23

MARCH 10, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

Supreme Court Calendar

Wednesday, May 10, 1922, will be the last day for
hearings before the Supreme Court, whether by oral
argument or submission on briefs.

MONDAY, MARCH 13, 1922

Ex5596 ISH-THH	Miss Swift, Inc., vs Z. K. Hoffman et al	S&H-MAS
Ex5597 ISH-THH	Miss Swift, Inc., vs Z. K. Hoffman et al	M A S
Ex5537 P M O'R	B. J. Hart vs B. C. Cunningham	E M S
Ex5519 J H R	V. Hewett vs C. N. Hewett	G K & G
Ex5448 P & D	A. H. Burns, Sr., et al vs Wm. Brightman et al	W & G
Ex5547 J L C	Angelo Grande vs The Eagle Brewing Co.	M & S

WEDNESDAY, MARCH 15, 1922

Ex5583 J J D	Elizabeth R. Chester vs T. D. Picard	H B A
Ex5581 F H M	Northway Motor Co. vs. John Pugh	Q & K
Ex5588 J F H	J. Macchia vs J. H. Ducharme	A & A
Ex5553 H E & M	H. M. A. Hathaway vs C. F. Reynolds	B W G
Ex5460 M D C	Margaret Dunlavey vs William Taber	C C & M

FRIDAY, MARCH 17, 1922

Ex5594 M & B	Wallace L. Wilcox vs Frank H. Swan et al	C W
Ex5595 M & B	David P. Morris vs Frank H. Swan et al	C W
Ex5589 K H & F	W. Borda vs Avice Weed Borda	T & C
MP 363 K H & F	W. Borda vs Avice Weed Borda	T & C

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MARCH 13, 1922

Eq4990 J J R	B. Parker vs Harriet Parker et al	
44781 F & H	Iola Brayton vs D. A. Clarke	
Eq5743 E & A	G. W. Wiener vs A. H. Schreiber & Co., Inc.	W L F

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52369 W & G	Lidia C. Daneker vs Northwestern Mut. Lif Ins. Co.	G H & A
52370 W & G	Lidia C. Daneker vs Aetna Life Ins. Co.	G H & A
Eq5520 E & A	H. C. Haldane et al vs O'Bannon Corp.	
Eq5746 W & G	H. A. Samson, Exr. vs J. Paolino et al.	
Eq5750 Chaffee	E. B. Shepard vs Providence Needle Company	

TUESDAY, MARCH 14, 1922

Eq5740 Ziegler	G. K. Dunopulos vs C. Pappothous	
Eq5745 Turano	Mary J. Gilbert vs W. C. Ingalls	
50486 P & DeP	Fred J. Topping vs John V. Price	R & H
Eq5254 McG & S	R. B. Deware vs Ind. Chem. Co.	W & G
50525 E C S-B & B	D. Basile vs Vincent Caldedo	
Kent. L B & McC	L. A. Howland vs Emma V. Allen	L A N
Eq5751 R & R	N. Jackman vs Mary Jackman	

WEDNESDAY, MARCH 15, 1922

Eq5690 Coon & C	J. D'Arcy et al vs Delia D. F. Metivies	
50131 F & H	Wm. F. Wright et al vs U. S. Fire Ins. Co.	Hebert
50132 F & H	Wm. F. Wright et al vs Ohio Farmers Ins. Co.	Hebert
Eq4990 J J R	B Parker vs Harriet Parker et al	L O & K
Eq5537 E D H	R. A. McDuff vs T. F. Randall	W & W
51162 E L J	Philias Auger vs Sun Ins. Co.	T. M. O'R
Marcus	G. S. Standish Adv. Agency vs Com. Service Co.	

Jury Trial Calendar

MONDAY, MARCH 20, 1922

50509 W.Scott-T	Louis H. Comstock vs John Hope & Sons E. & M. Co.	F A Jones
51227 AS&APJ	Milbury Atlantic Mfg Co. vs Rocky Point Amus. Co.	P C Joslin
51393 B & B	Joseph S. Blumenthol vs Roselle Mills, Inc.	A & A
51469 S. K. & S.	Marian Ballou vs William T. Talty	C C & McC
51470 S. K. & S.	Marie Coutanche vs William T. Talty	C C & McC
51471 S. K. & S	Eva M. Gobeille vs William T. Talty	C C & McC
51472 S. K. & S.	Sabina Replogle vs William T. Talty	C C & McC
49159 C.A.Kelley-Z	Elizabeth Dwyer vs Rhode Island Co.	Sweeney
47606 McG & S	Michael Colaluca vs Michele Marra, alias, et al.	P & DeP
46510 P & DeP	Michele Marra et al vs Michele Colaluca	McG & S
48202 W & G	Edmund A. Buckley vs James B. Winward	J. Henshaw
50716 E C Stiness	Providence Buick Co. vs S. Klein	B & B
49860W A G	James G. McKittrich vs George H. Bates	P & DeP
46197 F & H	Baer Ackerman vs Louis Gershman	W A H
52276 L F Nolan	Mary E. Jordan vs Lucy Stove exr.	J E Brennan
51757 P & DeP	Salvatore Ottiano vs Royal Ins. Co. Ltd.	Jackvony

TUESDAY, MARCH 21, 1922

51014 W & W	Sarah M. Sweet vs Thomas K. Fisher	P & DeP
48214 R & R	Samuel H. Ernstof vs Frank C. Butman	R F B
48215 R & R	Joseph Ernstof vs Frank C. Butman	R F B
48216 R & R	Pearl Ernstof vs Frank C. Butman	R F B
51497 Bennett	Vital J. Prezeau vs Walter L. Clarke, C. T.	ES Chase
48593 F & H	John H. B. Newman vs Robert G. Wilson	W S J
48595 F & H	Lena C Newman vs Sarah Wilson	W S J
48594 F & H	Lena C. Newman vs Robert G. Wilson	W S J
51713 E H McC	Harry Carp vs Charles Fierstein	C&C-GE&C
49340 P & DeP	Felicia Silitro vs Michele Cornicelli	L V Jackvony
52319 W & G	Bradbury L. Barnes vs Hannah M. Fiske	C A Kelley

WEDNESDAY, MARCH 22, 1922

50782 P & DeP	Vincenzo Marcello vs Michael J. McGlynn	F & H
51221 Gunning	Lilliam M. Legary p. a., vs Travelers Ins. Co.	Barnefield
50013 P & De P	Lena Tamburrino vs Elizabetta Buttero	J V
50249 J V	Cosmo Buttero vs Lena Tamburrino	P & DeP
50250 J V	Elizabeth Buttero vs Lena Tamburrino	P & DeP
48255 M C & C	Samuel Waldman vs. E. F. Drew & Co.	G M & H
49116 W C H Brand	Abram Mileosky vs Oel F. Robinson	W A Scott
51865 T. L. Carty	Marie R. Veins vs Joseph Navoy	S N
51866 T L Carty	Berkman Viens, p. a., vs Joseph Navoy	S N
49990 L Pouliot	Raymony J. Galvin vs "Dummy" Johnson	J H Coen
52367 G M & H	Max Lowenthan et al vs Samuel Waldman	W C & C
P.A.811 C S & McC	John W. Miller vs George H. Saillant, adm., et al	W H McS
49884 F & M-L	Ermeline Romano vs Antonio DiMarco	P & DeP
50123 Stiness-M-B	Standard Nut & Bolt Co. vs Danforth & King M Co.	W H McS
50398 E H Ziegler	Jane Redfern vs Richard Rosa	P Romano
50615 C C & McC	Eunice Williams vs Louis Kelman et al	N Hilfer
52641 W S F	Charles S. Williams vs George F. Peck	T J D

THURSDAY, MARCH 23, 1922

48039 C & C	John J. Quirk vs John Dallas	B & C
50180 A Chaffee-B	Charles W. Hanson vs Harry Fiske	L W D
50203 Con & C	Arthur Conaty, Rec., vs Louis Torghen	R & R
36982 T & C	Helen M. Scott vs Henrietta A. Longley	W & G-L
49524 H E & M	Jemima McFarlane vs N Y N H & H R R Co	E J P
49904 F & H	Arthur Willis, p. a., vs Isaac Saunders et al	B & B
48631 McG & S	Ida L. Reiner vs Nicholas F. Reiner	F & H
P.A.772 T P C	Louise White vs John E. Gill	F & H
52086 P & DeP	Ellen Pierce vs Joseph A. Pierce	T P C
47575 L V J-R	Giuseppina Montecalvo vs Guiseppe Anzievino	P & DeP
52326 C & H	William Hitchen vs Narragansett Elec. Lighting Co.	J H S
45784 M & T	Edward J. McGuirk vs Local Union 476 U. A. P. & S. of U. S. and Canada	JJR-D&H
41799 J H Coen	Ida L. R. Reiner vs Nicholas F. Reiner	F & H
50829 L B & Mc	Fannie L. Walsh vs William C. Greene	S K & S
45994 R & R	Torhild W. Johnson vs A. Portini	C R E
45185 R & R	Wm. A. Sutherland vs Margaret L. Mulholland	
49649 B & B	Bay State Fur Co. vs Maggie Cavalieri	P & DeP
49513 Stiness	Farmers' Co-operative Assn. vs. Buckingham Co.	
50449 P C Joslin-B	Caesar Barrows vs Eugene P. Winward & Son	H E & M
51137 Clinton-G	Umberto Lautini et ux vs Michele Maretta et al	Ziegler
50423 C C & McC	A. A. & A. H. Nahigan vs Frank H. Swan et al, Rec.	C Whipple

SUPREME COURT

Delia Gingras

vs.

Charles E. Linscott

M. P. No. 372

OPINION

March 8, 1922.

STEARNS, J. The petitioner, Delia Gingras, was committed to the Providence County Jail in Cranston on January 9, 1922, by virtue of an execution issued by the Superior Court on a judgment in an action of trespass on the case for slander. The respondent is the keeper of the County Jail.

At the time of the commitment the prisoner's board for one week was paid in cash in advance by the committing officer to the respondent. On January 12, the respondent received by mail from the committing creditor a United States postal money order for four dollars, the amount of the prisoner's board for one week, which was made payable to the order of respondent at the local post office in Cranston. This money order was at once endorsed by respondent. The clerk in the office of the jail, on the same day and in pursuance of the practice of the office, drew four dollars in cash from a certain separate fund kept in the office, called the "Tobacco Fund," placed the postal money order in the fund and the cash thus withdrawn was then applied and credited to the board of the prisoner for the following week. The local postmaster in Cranston also kept a store and supplied therefrom various articles for the County Jail. The practice at the jail was to use such money orders as were on hand at the jail in payment of the bill for supplies which was usually

presented weekly by the postmaster. The money order in this case was received by the postmaster in part payment of his bill some two or three days after the beginning of the petitioner's second week of confinement. Petitioner claims that the committing creditor has not paid or caused to be paid from and after January 16 in advance the board of the petitioner, and that petitioner is illegally detained at jail and is now entitled to be discharged from custody.

The proceeding is by petition for a writ of habeas corpus.

Chapter 325, Section 1, General Laws, provides that whenever any person shall be imprisoned upon execution in any action whatsoever "the party at whose suit such person is imprisoned shall pay to the keeper of the jail in which he is imprisoned the sum of three dollars per week in advance for the board of such prisoner." The amount paid by the creditor for the board of the prisoner is to be added to and is made a part of the costs of commitment and detention to be paid by the prisoner. (Sec. 3). By Chapter 1649, Sec. 16, Public Laws, 1917-1918, in amendment of Chapter 364. Section 16, the fees allowed to jailers for the board of prisoners confined in civil cases on civil process in Providence County Jail are raised to four dollars a week. The effect of this latter enactment, although no reference is made therein to Chapter 325, is to amend Chapter 325 and to require the prepayment of four dollars a week.

The question is, has legal payment been made in this case? If the creditor wishes to confine the debtor in cases where the right to do so is given by the statute, he must pay for the debtor's board and to prevent any chance of loss by the State, the payment must be made in advance. The question in regard to the rights of the keeper to require pay-

ment to be made in a particular manner is not in issue. The keeper cannot give credit to the committing creditor, but neither the mode nor the medium of payment is prescribed by the statute. Payment by legal tender is not required. Payment and acceptance of money which is current in the community and generally used in business transactions would undoubtedly be good. A post office money order is a method provided by the Federal government to insure greater security in the transmission of money. It is in common and daily use in business transactions and is particularly useful in the transmission of small amounts of money. By accepting the order and cashing the same from the tobacco fund, we think the payment was complete and can fairly be held to be a payment in money. But even if this had not been done, we think the acceptance of a valid money order by respondent before the prisoner's board was due was a payment within the meaning of the statute. The State was protected from loss. By his acts in buying the money order and sending the same to the respondent, the creditor had parted with all right to control the payment of the money. The order to pay was not subject to any conditions nor was there any question that the payee could collect the cash whenever he desired. The acceptance of the order by respondent made the transaction complete and constituted payment.

The petition for writ of habeas corpus is denied.

For Mrs. Gingras: Cooney & Cooney.

For committing creditor: Thomas P. Corcoran.

Note: Judge Hahn in the Superior Court decided the same way when a similar petition was brought before him.

SUPREME COURT

Emma J. Jarvis

vs.

Erv'n Collins et al

} ..Ex.&c. No. 5531

(Before Brown, J., below)

RESCRIPT.

March 8, 1922.

This is an action in assumpsit to recover on a certain promissary note made by the defendants April 1, 1910, by the terms of which said defendants promised to pay to one Almira M. Eddy or order one year after date six hundred dollars with interest at the rate of six per cent per annum payable semi-annually until the principal sum was paid, whether at or after maturity, and all installments in arrears whether before or after maturity were to bear interest at the same rate until paid. This note was endorsed by the said Almira M. Eddy and delivered to the plaintiff, her sister.

Defendants pleaded the general issue and also a special plea, alleging that before the endorsement of said note to the plaintiff by the payee, said Almira M. Eddy by instrument under seal did release to the said defendant all claims for interest on said note. To this plea the plaintiff replied that the release was not the deed of the said Almira M. Eddy.

At the trial this release was offered in evidence by the defendants. It appeared that it was executed April 22, 1918, by the said Almira M. Eddy and by its terms purported to release to the defendants "all claims for future payments of interest and all interest both which is due now and which will be due in the future during the period of my life," on said note.

The plaintiff claimed that she became

the owner of the note in 1916 by transfer of the same from the payee, whereas the defendant claimed that plaintiff did not become the owner of the note until after the execution of the release in 1913 by Mrs. Eddy.

The date of the transfer of the note was one of the main issues submitted to the jury, who found a verdict in favor of the plaintiff for \$600 and \$102 interest.

Defendants made but one request for a charge to the jury, which was granted by the trial justice. No exception was taken by the defendants to the charge of the trial justice during the trial. The motion of the defendants for a new trial in the Superior Court was denied by the trial justice and the defendants are now before this court on their bill of exceptions, the sole ground of which is that the trial justice erred in his refusal to grant them a new trial.

In the rescript on file in this case the trial justice states "there was evidence to warrant the jury in finding that this note, endorsed by Almira M. Eddy, the payee and its then owner, was transferred and delivered to the plaintiff in 1916, two years before the release was executed. Mrs. Eddy had no right at that time to release the interest on the note. The jury returned a verdict for the plaintiff for the face of the note with interest, which counsel have agreed is \$102. The verdict is sustained by the evidence." From this excerpt of the trial justice it appears that the justice not only saw no reason to disturb the finding of the jury but also that the verdict met with his approval. There is nothing in the record which warrants a finding by this court that the verdict of the jury as thus approved by the trial justice is not supported by sufficient evidence to sustain the same.

The defendants' exception is overruled and the case is remitted to the Superior

Court with direction to enter judgment upon the verdict.

For Plaintiff: H. A. Andrews.

For Defendants: Thomas F. Vance.

SUPERIOR COURT

Arthur A. Sullivan

vs.

Wallace Braidic and

Rose Bradic

{ Eq. No.

{ 5675

RESRIPT

March 9, 1922.

BARROWS, J. Heard on petition to enforce a mechanic's lien for \$530.

The value of the work is not questioned. The lien is claimed for labor in excavating a cellar between August 1 and August 15, 1921. Complainant entered into a written contract with one Budlong on July 28, 1921, to do the work. At that time neither Budlong nor respondents were the owners of the land. Respondents hoped to own it. Budlong had been employed by them on July 1 to buy the land in question, and had been given \$1200 with which to do so, and to start a building. There is no evidence that he had made any binding contract to purchase from the owners of the land (Lapham heirs) prior to the actual passing of the deeds from them to Lucy A. Budlong, his wife, on August 16, 1921. These deeds, dated July 14, 1921, could not have been delivered earlier than August 11, at which time they were acknowledged, and there is no evidence of actual delivery at any time. They were recorded on August 18, at 9:45 A. M., and at 10 o'clock A. M. on the same day was recorded a deed from Lucy A. Bud-

long to respondents which had been executed August 15. The notice of lien claim was given to respondents as owners August 31. No notice was given or claim made against any other person as owner.

Chase vs. Pidge, 21 R. I. 70, holds that the notice must be given to the owner at the time the work starts for which the lien is claimed.

To the same effect is Hawkins vs. Boyden, 25 R. I. 181 at 185.

Complainant's position is, first, that respondents were the equitable owners at the time the work was started; this he urges was by reason of a contract to sell, which he assumes must have existed between the Laphams and Budlong as respondents' agent; second, that respondents, even though not the owners at the time the work was done, are equitably estopped to deny their ownership at that time.

We cannot sustain complainant on either theory. There is no evidence that any binding contract of sale existed between Budlong and the Laphams on August 1 or at any other time. Hence is invalid the claims of equitable ownership in respondents as vendees under a contract of sale to whom notice was properly given.

As to equitable estoppel, it is true that mechanic's liens follow the course of equity. They are, however, purely statutory.

Hawkins vs. Boyden, 25 R. I. 181.

The rights of all parties are carefully limited. Being in derogation of the com-

mon law, the statutes must be strictly construed.

Newhall vs. Campbell Machine Co., 17 R. I. 74.

Hence, we do not believe that broad principles of equity, which are often invoked to cover cases where there is no adequate remedy at law, are applicable to cover a defective notice to secure a mechanic's lien served upon one not the legal owner of the real estate.

One purpose of recording acts is to give a contractor an opportunity to find out who is the owner of the land upon which he is asked to put his labor or materials.

Blackmar vs. Sharpe, 23 R. I. at 421, quoting from Phillips on Mechanic's Liens.

If the contractor takes no steps to investigate and contracts solely on the strength of his personal confidence in the man for whom he agrees to do the work, he can not expect to enforce a lien if that man is not the owner or representative of the owner.

In the present case also one of the essential elements of equitable estoppel seems to be lacking. We find nothing in the evidence to show that respondents did anything to mislead complainant or that he relied upon any act of the respondents. Under these circumstances we fail to find that respondents were the owners in any sense used in the mechanic's lien law.

Petition denied.

For Plaintiff: J. O. McManus and Edward F. McElroy.

For Defendants: E. P. B. Atwood.

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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 24

MARCH 17, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
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Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Supreme Court Calendar

MONDAY, MARCH 20, 1922

Ex5569 G M & H John E. McMurtry et al vs River Spinning Co. E & A

WEDNESDAY, MARCH 22, 1922

Ex5579 P&S-PWG Susan H. Graham, Ex. vs Walter Nye et al A G C

FRIDAY, MARCH 24, 1922

Ex5598 E R W Frances Lucey, p. a. vs John F. Allen C M B & L

Ex5599 E R W John J. Prendergast vs John F. Allen C M B & L

Ex5600 E R W Helen M. Predergast vs John F. Allen C M B & L

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MARCH 20, 1922

Eq5610 Bowen S. Rocchio vs F. Lombardo et al. T F F

Eq5086 McG & S E. E. Bevan vs Annie F. Brooke J G C

(Heard in part—Barrows, J.)

50297 C M B & L A. F. Blackburn vs L. D. Pierce Q & K

Eq5752 Beagan Max S. Pearl vs Samuel A. Pearl

Eq5720 J H A G Aaron G'stein vs Philip Kamras Com & C

50413 B & B Union Mills vs Leo Glass et als I Marcus

TUESDAY, MARCH 21, 1922

Eq5326 P W G Susan E. Claflin vs Rob. McLaughlin J P B

Eq5575 P & DeP Manuel Armieda vs M. Medeiros Q & McK

Eq5745 P & DeP Mary J. Gilbert vs W. C. Ingalls W M P B

WEDNESDAY, MARCH 22, 1922

Assgt. 173 A N P In re Assignment of Edward C. Peterson

52644 F H Bellin Shamoon Jani vs Norman Simon et al T F V

52602 R & R Lillian Berger, p. a. vs K. Vendt F & H

52562 R & R J. K. Warshegawsky vs U. E. Rys. Co. Whipple

52671 R & R Anna Kochler vs John G. Oates J E B

52672 R & R Herman Kochler vs John G. Oates J E B

Eq5741 J C S Vincent Bucci vs Falciglia Amusement Corp

Eq5320 C C & McC J. M. Anderson vs A. E. Johnson et al McG & S

Eq5322 C C & McC Grant Perce vs J. F. Donovan et al McSoley

Eq5323 C C & McC Grant Pierce vs Claus Hanson et al

Eq5744 L & McC Roy F. Wilkins vs Frank B. Wilkins

Jury Trial Calendar

MONDAY, MARCH 27, 1922

50516 Conaty Wendell J. Bourguignon vs Jonathan Andrews St'ness-M

51196 S & L

Arthur Stone vs Charles Wagner

W & W

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National Exchange Bank

63 WESTMINSTER STREET

51424 C A Walsh	Alfred G. Kent et al. vs H. R. Conklin	P & Sherwood
48999 C & Clason	Joseph Nutman vs R. I. Company	Whipple-Sw
40873 W H McSoley	Charles W. Sanders p. a. vs Alfred T. Stewart	F & H
49692 B & B	Gurnaro Manfredo vs Joseph McCormick	Cooney & C
51885 Stiness-M	Curtis & Co. Mfg. Co. vs Millers Inc.	Wildes
51630 P & DeP	John Vendetti vs Anna Robrich	A N Peterson
36165 W & G	Christina Barclay vs Wm. R. Page	C C & McC

TUESDAY, MARCH 28, 1922

50752 C A Kelley	Emily Reddington vs George C. Hervey	E M Sullivan
48638 R & R	Joseph Bida vs Dudley Hardware Co.	G H & A
48639 R & R	Gussie Bida vs Dudley Hardware Co.	G H & A
48640 R & R	Martha Bida p. a. vs Dudley Hardware Co.	G H & A
50480 L Semenoff	R. I. Supply Co. vs Wm. H. Doris	C C & McC
51406 J Ousley	Frank C. Richmond vs Packard M. Car Co. of Bos.	C & Ball
51889 B C	Pietro Palermo vs Antonio DiCeuzo	F & M
52012 W S Flynn	Harry Spencer vs Joseph Pollock	L B & McC
51426 F & H	J. H. O'Neil, Jr., vs Carrie Ridley Heneshoff et al.	H E & M
52380 F M & H	National Bank of Commerce vs Arthur S. Petts	C R R
51759 Stiness-M	Bliss Rubber Co. vs Albert Bliss	J C S
52611 P & DeP	Carmine Barelli vs Herbert J. Higgins et al.	R T B
52681 P & DeP	Evaristo Nauni et ux. vs. James Archie	C & Clason

WEDNESDAY, MARCH 29, 1922

51180 C & B-G	Packard M. Car Co. vs James Sargent of Boston	A Romano
51208 D A Colton	Daniel Grady vs Sylvester Argent	A Romano
51209 D A Colton	Mary A. Grady vs Sylvester Argent	F J Rivelli
51518 J H Coen	Louis Lash vs Stephen Lash et ux.	S S Bromson
49206 W & G	Beatrice E. Stafford vs Benjamin W. Grossman	Rivelli
51775 Joslin	Union Charcoal Co. vs Luigi Melie	Chace-C-H
50792 Q&K-F&H	Edward McCormack vs Charles Tyron	

50791 Q&K-F&H	Edward McCormack vs Thomas P. Dunn	Chace-C-H
51867 T L Carty	Rena Viens p. a. vs Joseph Navoy	S N
47570 E C Sti-M	Delia Stove, admx., vs The Irons & Russell Co.	Barnfield
52239 C A Walsh	James J. Downey vs Harriet J. Miller	Stiness-M-B
52679 P & DeP	Frank Kane vs Newport Electric Corp.	S & H
52680 P & DeP	Isabella Kane vs Newport Electric Corp.	S & H

THURSDAY, MARCH 30, 1922

49533 G F Troy	Giuseppe Pizzi vs John D. Avedisian	F & M
51519 Sullivan-S	T. Clarence Hermann vs Granville A. Beak	E & A
51529 A S J-J	Carriage & Toy Co. vs N. Y., N. H. & H R. Co.	J J P
49221 R & R-A	Joseph Chernov vs Alexander C. Brown	Q & K
43316 R & R	City of Providence vs John F. Lennon et al	F & H
52074 G E & C	Louis E. Davis vs Bay State Syndicate, Inc.	H E & M
52075 G E & C	Edith M. Davis vs Bay State Syndicate, Inc.	H E & M
51034 J G LeC	Ludebina D. Alves vs Mary Olivera	P Romano
45974 P & DeP	Michele Del Monaco et al vs The Sperry Eng. Co., Inc	W & G
52266 B & B -	Mary Soares vs Francisco R. Furtado	S J Casey
52456 C A Walsh	Catherine T. Lawson vs G. Howard Smith	P & S
50149 G W B	Michael Malpa vs Ida Bezzan	C & O'C
50274 G W B	Crastese Spazrano vs Ida Bezzan	C & O'C
52201 I Marcus	Charles M. Gerber vs Royal Insurance Co.	G E & C

FRIDAY, MARCH 31, 1922

49805 J Ous-McD	Dewey E. Guertin vs Mexican Petroleum Corp.	
49983 F & M	Charles McWright vs Providence Telephone Co.	R T B
49780 F & H	James F. Murphy vs Frank H. Swan et als., Rec.	Whipple-W
49781 F & H	Emma L. Murphy vs Frank H. Swan et als., Rec	Whipple-W
48832 McSoley	Lu'gi Saccaccio vs Elma DiBiase	P & DeP
51897 Stiness-M-B	Hartford Mach. Screw Co. vs E. A. Eddy Mach Co.	W & G
52365 C & DeSim	Nicola Mauro vs A. Maklin	R & R
51544 F M & H	The M. Steinert & Sons Co. vs Louis H. Borod alias	C R Easton
52085 P & DeP	Marian DiMeo, admx., vs Gaetano D'Ordine et al.	J V
50820 P & DeP	Adamo DeSimone vs Ambrose Sinapi	E M Sullivan-S

SUPREME COURT

Owen P. Lee
vs.
Everett E. Jones et al. } Ex. & c. No. 5440

OPINION.

(Before Brown, J., Below.)

STEARNS, J. This is an action of trespass for false imprisonment in which are joined counts in trespass on the case for malicious prosecution. The defendant, Everett E. Jones pleaded the general issue to each count. The defendant, John R. Wilcox, who is Sheriff of Washington County, to the counts for false imprisonment, pleaded justification in that the arrest complained of was made by him in his official capacity on a valid warrant commanding the arrest of the plaintiff, and the general issue to the counts for malicious prosecution.

The case was tried before a jury and at the conclusion of the testimony the trial justice, on motion of the defendants, directed a verdict for the defendants. Plaintiff's exception to this action of the trial justice is the main question raised by his bill of exceptions. It is conceded that the action of the trial justice was correct in directing a verdict in favor of the defendant, Oliver Jones.

In the summer of 1918, a check dated July 11, 1918, drawn by the Coast Fish Co., Inc., of New York City, for \$45.25, payable to Elmer Babcock, a resident of Wakefield, R. I., was received by mail at the post office in Wakefield, and by mistake the letter, enclosing the check, which was addressed to Elmer Babcock, was deposited in the post office box of Elmer E. Babcock, a nephew of the payee.

Elmer E. Babcock, who knew that

check did not belong to him, indorsed the check as follows, "Elmer Babcock," and, as he admitted, thereby committed a forgery. He testified that he held the check for a short time, but does not know just how long, and then cashed it at the store of the defendant, Everett E. Jones, in Wakefield, who was doing business under the name and style of "Jones Bros." Everett E. Jones testified that he knew nothing of the cashing of this check until late in the fall, when he was notified by the Wakefield Trust Co., with whom the check had been deposited for collection, that the indorsement was forged; he paid the amount of the check to the Trust Company and some six weeks later the check was returned to him. Jones had no record in his store of the date of the cashing of the check, but upon inquiry he learned from one of his clerks that, although she could not tell the time definitely, she thought she remembered cashing the check for the plaintiff, Owen Lee. Plaintiff was a customer of Jones and had cashed checks at different times at the store. On or about July 15th, plaintiff made a purchase at the store, in payment for which it is claimed a check was cashed for him. After receiving the check from the bank Jones turned the check over to Sheriff Wilcox on December 8th and the latter at once began an investigation of the case. At the request of the Sheriff, Jones procured and gave to the Sheriff a sample of the plaintiff's handwriting, in which the words "Elmer Babcock" appeared. At this time Jones did not know when the check had been cashed, but supposed from the date on the check that it had been cashed at his store a few days after the date of the check. He did not tell the Sheriff the date when it was cashed and does not remember whether the Sheriff asked in regard to this. Subsequently, it was discovered from the Trust Company that the check was deposited on Monday, August

26th, and Jones from that fact thought the check must have been cashed in his store on the preceding Saturday, the 24th day of August. Plaintiff, who had been living with an aunt in Wakefield, after the 18th of July, went to live for a few days with his uncle, Elmer Babcock. On the 22nd of July, plaintiff was mustered into the United States Army under the Selective Service Act, at East Greenwich, and on the following day he went to an army camp on Long Island. He was honorably discharged from the service on December 13th and arrived home in Wakefield December 14. He was in Wakefield on leave a part of two days in early November.

Sheriff Wilcox testified that Jones told him he thought the check was cashed about the 14th or 15th of July, judging from the date of the check, and also because plaintiff had bought clothes in his store about the 15th or 16th of July. After interviewing the clerks in Jones's store, the Sheriff interviewed the postmaster and his assistant. From them he learned that plaintiff's mail had been regularly placed in the box of his uncle, Elmer Babcock, from whence all of the mail in the box was taken at different times by plaintiff or Babcock's children; that in the fall of 1918, the postmaster had been directed by Mrs. Elmer Babcock not to deliver any more of their mail to any one except on written order. The Sheriff submitted the check and specimen of plaintiff's handwriting to various people, including the postmaster and the teller of the Trust Company. All agreed that the handwriting was the same on each exhibit. The Sheriff then stated the results of his investigation and submitted the writings to a friend, a captain of police in the city of Providence, who had had much experience in criminal cases, and also to the justice of the local district court, who was a lawyer. By each of them, he was advised that the case was a

proper one to be brought against the plaintiff, and that the handwriting of each exhibit was made by the same person. The Sheriff then consulted his attorney in Westerly, a practicing lawyer of experience and of good standing in his profession. The Sheriff testified that he stated to his attorney all the facts in regard to the case. In this he is corroborated by the attorney who testified in detail as to the statements made to him by the Sheriff. The attorney advised the Sheriff that he had a good case against the plaintiff and that he thought it was his duty to bring the prosecution. The Sheriff then applied to the judge of the district court, who prepared a complaint and warrant for the arrest of the plaintiff on the charge of forgery, which was sent by mail to the Sheriff and on the 28th of December the complaint and warrant, having been sworn to before a local justice of the peace, was turned over by the Sheriff to his deputy with instructions to have the plaintiff brought in. The deputy notified plaintiff that the Sheriff wished to see him and on the afternoon of the same day, after an interview between the plaintiff and the Sheriff, the Sheriff directed the deputy to serve the warrant and plaintiff was arrested thereon. He was arraigned the same day and for want of bail was committed to the county jail. On the following Monday morning, the first court day after his arrest, he was arraigned in the district court and gave bail. Shortly afterward the Sheriff for the first time learned there was another Elmer Babcock in Wakefield. He obtained samples of the handwriting of this Elmer E. Babcock and, finding that it was similar to the handwriting on the check, he interviewed Elmer E. Babcock with the result that the latter admitted he had forged the indorsement on the check. Thereupon the Sheriff immediately telephoned the attorney for the plaintiff, and told him that

his client was innocent. Plaintiff's attorney, according to the testimony of the Sheriff, which was uncontradicted, then asked the Sheriff if he would have the case against plaintiff dismissed. The Sheriff stated that he would do so, and on the next court day the case was discontinued in open court, the Sheriff stating to the court that Lee was innocent, and that he wanted to exonerate Lee and have him honorably discharged from the court.

Plaintiff is not barred by this consenting to the discontinuance of the criminal complaint. The case is different from *Russell vs. Morgan*, 24 R. I. 134, in which case the discontinuance of an action for malicious prosecution was entered by the court in accordance with the written agreement of the parties to the action. In the circumstances to require the plaintiff to insist on further court proceedings in order to protect any right of action he might have against the defendants would be reasonable and would only result in giving greater publicity to the charge erroneously made.

It is claimed that Everett E. Jones had so connected himself with the institution and prosecution of the complaint that he made himself finally responsible therefor and that there was such irregularity in making of the complaint and the issuing of the warrant thereon that neither of the defendants is entitled to any protection by reason of the issuance of the warrant. There is no evidence to support a finding against Everett E. Jones on any of the counts. He made a complaint of the commission of a crime. The proceedings were begun by the Sheriff acting on his own judgment. The complaint and warrant charge that the check was cashed at Jones Bros.' store July 20. Plaintiff expressly disclaims any charge that this allegation was due to any conscious misrepresentation by defendant Wilcox, but he does claim that it was a

misstatement which was due to gross negligence; that on the back of the check it appears that the check was paid by the drawee bank, August 28, 1918, and thus it was notice to the Sheriff of the date of the offence. Plaintiff appears to be in error in this respect. Some of the indorsements are not very plain. Neither the indorsement of Jones Bros. to Wakefield Trust Co., nor of the latter company to any bank for collection have any date. The only date, August 28th, is the receipt of payment by the Franklin Trust Co. There is nothing on the check which shows the date when it was first cashed. Negligence is also charged in that the complaint charges an intent to defraud Jones Bros., a co-partnership, whereas in fact there was no co-partnership. This inaccuracy in the allegation of the person defrauded is immaterial in the present inquiry. The real question was not who was defrauded, but who committed the fraud. The allegation of the date is formal and the prosecution is not bound thereby. Plaintiff's complaint of irregularity in the process then comes to this, that the officer's preliminary investigation was insufficient to justify the proceeding by warrant of arrest.

In *Hobbs vs. Ray*, 18 R. I. 84 (1892), the facts are not fully stated in the opinion, but from an examination of the original papers in the case, it appears the declaration alleged that defendant "maliciously intending to oppress and unjustly to imprison the plaintiff" procured the issuance of a writ of arrest in civil action by making a false and fraudulent affidavit that the plaintiff was about to leave the state. Plaintiff was arrested and imprisoned for three days. He was then, upon his motion, discharged from arrest by the court, who found that the plaintiff had no intention of leaving the state. Later a demurrer to the declaration was sustained. It was held that an action for false imprisonment would not

lie when the arrest is made under process wrongfully obtained but valid on its face and issued by a court of competent jurisdiction, that the gist of the action is the unlawful detention of another without his consent and malice is not an essential element of this form of action.

The decision in the *Hobbs* case was followed and approved in *Lisabelle vs. Hubert*, 23 R. I. 456; *Calderone vs. Kieran*, 23 R. I. 578; See also *Jastram vs. McAuslan*, 31 R. I. 278.

In the case at bar the Sheriff did not know plaintiff and there is no evidence of actual malice. The writ was regular and valid on its face and issued from a court of competent jurisdiction. Even if the investigation by the officer was insufficient, that fact did not make the process invalid. At most, the officer was guilty of negligence. This does not invalidate the process and plaintiff's remedy, if any, is by action for malicious prosecution.

We come now to the counts for malicious prosecution. Public policy requires the exposure of crime and punishment of the criminal. It is the duty of the citizen to give notice to the authorities of the commission of crime, and of the officers of the State to investigate and prosecute in proper cases. For these reasons it is generally held, as stated in *Fox vs. Smith*, 26 R. I., that action for malicious prosecution are not favored in the law and clear proof of malice and want of probable cause are required to establish a cause of action. But a charge of crime should not be lightly made and in the consideration of the testimony we are not unmindful that an innocent man has been subjected to imprisonment and the temporary disgrace thereof. As the facts are not in dispute, the question of probable cause is one of law. We think there was not sufficient evidence to warrant the submission of the case to a jury.

In *Wells vs. Jordan*, 20 R. I. 630, the

general rule was approved that an officer may arrest without a warrant on reasonable suspicion, founded either on his own knowledge or on information from others, that a felony has been committed. To justify him in acting on information it must come from creditable persons. In the case at bar a felony had been committed. The officer did not attempt to arrest on suspicion without a warrant, but only proceeded after he had made a rather extensive investigation and had received information from persons whose credibility is not questioned. He believed that plaintiff was guilty. This in itself is not a defence, but if such belief was an honest and reasonable belief and not one arising from some mental peculiarity and error of defendant himself, it is a valid defence. *Mowry vs. Whipple*, 8 R. I. 360. We think the officer had reasonable grounds to believe plaintiff was probably guilty.

The question is, was there sufficient evidence to warrant the district court in finding that defendant was probably guilty (Sec. 19, Chap. 281, Gen. Laws) and in binding him over to await the action of the Grand Jury? There is nothing to indicate that the officer failed to make a full and fair statement of the case to his attorney. His attorney, if he discharged his duty properly, must have passed judgment not only on the results but also on the sufficiency of the investigation made by the officer. Having stated the case fairly to his counsel, and having acted in good faith on the advice of counsel, the officer is not liable for malicious prosecution. *Bartlett vs. Brown*, 6 R. I. 37; *King vs. Colvin*, 11 R. I. 582; *Newton vs. Weaver*, 13 R. I. 616; *Goldstein vs. Faulkes*, 19 R. I. 281; *St. Pierre vs. Warner*, 24 R. I. 295.

All of the plaintiff's exceptions are overruled and the case is remitted to the

Superior Court with instructions to enter judgment on the verdict.

For Plaintiff: Stephen J. Casey, Curran & Hart and Wilson, Churchill & Curtis.

For Defendant: Abbott Phillips, Green, Hinckley and Allen and Benjamin W. Grim.

SUPREME COURT

Charles E. Andrews et al.	vs.	Rhode Island Hospital Trust Co. et al.	} Ex. &c. No. 5545
Jonathan Andrews	vs.	Rhode Island Hospital Trust Company et al.	} Ex. &c. No. 5546

OPINION

(Before Brown, J., Below.)

SWEETLAND, C. J. The above entitled causes are appeals from a decree of the Probate Court of North Smithfield admitting to probate certain instruments as the last will and testament and two codicils thereto of Dency A. Wilbur, late of North Smithfield, deceased.

The appeals were consolidated and tried in the Superior Court before Mr. Justice Brown sitting with a jury and resulted in a verdict sustaining said instruments as the last will and codicils of the testatrix. The appellants duly filed their motions for a new trial which were denied by said justice. The causes are before us upon the appellants' exceptions to the decision of said justice upon the motions for a new trial and upon exceptions to certain rulings of said justice made in the course of the trial.

Said appeals were placed upon the list

of those causes in the Superior Court, sitting for the counties of Providence and Bristol, which were to be tried in the city of Woonsocket.

At the opening of the trial of said causes and before the drawing of jurors the appellants moved to quash the list of jurors summoned for services at the trial on the ground that they had not been selected legally. This motion was denied. The appellants now urge their exceptions to the ruling of said justice. It appears that on Thursday, May 20, 1920, said justice set down these appeals for trial on Monday, May 24, 1920, and that late in the afternoon of said Thursday the jury commissioner received an order from the Superior Court to summon a list of forty jurors from which the panel for this trial was to be drawn. The jury commissioner for valid practical reasons summoned forty jurors from the cities of Providence, Pawtucket and Central Falls, and none from other cities and towns of the counties of Providence and Bristol. Ordinarily, when the time within which the summons for jurors must be served permitted, the jury commissioner was accustomed to summons jurors to serve at Woonsocket from more of the cities and towns of said counties than he did in this instance, but never from all. The ordinary practice of the jury commissioner in this regard tended to equalize the burden of jury duty among the cities and towns and was a reasonable performance of his duty; but it was not required by any provision of the statute. When, as in this case, the necessities of the situation required him to depart from his usual custom such departure did not render the jury list invalid, provided a fair and impartial jury might be obtained therefrom. The appellants do not claim that the jury impanelled to try their appeals was not fair and impartial and it does not appear that the appellants were prejudiced in any way by the manner in which said

jury list was made up. It has been held by this court that "a party has no vested interest in the selection of a particular juror," nor can he demand that a juror shall be a resident of any particular city or town of the county, for if he receives an impartial trial that is all he can require and with that he must be content. *McHugh vs. R. I. Co.*, 29 R. I. 206; *Stevens vs. Union R. R.*, 26 R. I. 90; *Fiske vs. Paine*, 18 R. I. 632; *Shepard vs. N. Y., N. H. & H. R. Co.*, 27 R. I. 135; *State vs. Fidler*, 23 R. I. 41. This exception of the appellants should not be sustained.

The appellants' exceptions to the denial of their motions for new trial should be overruled. The appellants' reasons of appeal are based upon their claims that the testatrix was induced to execute said will and codicils through fraud practiced upon her by one George W. Lothrop and by undue influence exercised upon her mind by said Lothrop. It appeared in evidence that Miss Wilbur never married; that after the death of her parents she and her unmarried sister Hannah lived together in the family homestead until the death of Hannah in 1909, and from that time until her own death in 1919 the testatrix continued to live in the homestead unaccompanied by any member of her family; that she had no relatives except distant cousins, with most of whom her association was not intimate; that said George W. Lothrop and his family had been near neighbors of the testatrix and her sister for very many years and that relation continued down to the death of the testatrix. The diary of the testatrix, kept by her with regularity for many years, was in evidence, and it shows that during a period from long prior to the execution of the will in 1909 and continuing to the year of her death the testatrix entertained feelings of friendship amounting to sincere affection for the members of the Lothrop family.

The evidence warrants the statement

of Mr. Justice Brown in his decision upon the motions for new trial that, "It is difficult to conceive of more intimate relations existing between two families who are not blood relatives." From the evidence the jury might find that Miss Wilbur before and at the time of the execution of said will and codicils was a woman of high character and very gentle nature, kindly and considerate towards others but with vigorous mentality and will, having business capacity and executive ability; that she was particularly interested in certain religious and charitable institutions and activities and that she took an active part in their management. Her estate amounted to between two hundred and twenty-five and two hundred and fifty thousand dollars. By the instrument purporting to be Miss Wilbur's last will and the codicils thereto she gave the great bulk of her property to various charities and, in addition to some bequests to her relatives, she gave Mr. Lothrop and his wife her homestead estate and the sum of ten thousand dollars each, and to their three daughters the sum of five thousand dollars each. From the evidence the jury might reasonably find that, although the testatrix consulted Mr. Lothrop upon business and other matters and had respect for and was influenced by his judgment and advice, such influence fell far short of coercion or restraint destroying her free agency. Said justice very carefully instructed the jury upon the law relating to the issues raised by the appellants' claims of fraud and undue influence. The jury's verdict that said instrument represented the free will of Miss Wilbur, supported by the approval of said justice, will not be disturbed by us. We think said justice was warranted in holding with reference to the appellants' claims that "acting upon the evidence the

jury could not well have reached a finding sustaining such contention."

The appellants excepted to the rulings of said justice permitting the proponents of the will to introduce evidence that the father and mother of Miss Wilbur were interested in the work of the Woonsocket Hospital, to which institution a large bequest was made in the will of Miss Wilbur, and also evidence that her father had made gifts to the hospital during his life. The introduction of this testimony was proper as furnishing some reason for her own bequest although there was abundant testimony that Miss Wilbur herself was deeply interested in the service of this charity.

The appellants also insist upon their exceptions to the following rulings of said justice refusing to admit certain testimony offered by the appellants. He rejected testimony as to who had charge of the funeral arrangements of Miss Wilbur's father in 1889, as to whether Mr. Lothrop had influence over Hannah, the sister of the testatrix, who died in 1909, as to who had charge of the arrangements for the funeral of Miss Wilbur; and said justice ruled out the following question asked of the witness, Mrs. Slocum, a neighbor of the testatrix, "Which of the two, Mr. Lothrop or Miss Wilbur, had ability to control the other by will power?" These rulings of said justice are without error.

The appellants sought to develop before the jury their theory as to a compelling power which Mr. Lothrop had acquired over the mind and will of Miss Wilbur, destroying her free agency and forcing her to execute these instruments in accordance with his wish. This theory was as follows: that Mr. Lothrop had carried on an improper intimacy with Hannah, the sister of the testatrix, that this became known to the testatrix and thereby through fear of his disclosure of

such intimacy Lothrop had acquired a sinister power over the testatrix which he exercised to force the making of these instruments. The appellants were permitted to introduce certain testimony as to the relations of Lothrop and Hannah, from which the appellants sought to have inference drawn in support of their theory. Most of this testimony, if true, is consistent with the sinister power over the testatrix which he exercised to force the making of these instruments. Most of this testimony, if true, is consistent with an innocent relation existing between friendly neighbors. The jury might well have found that no impropriety had taken place and further that whatever had been the nature of these relations they were unknown to the testatrix and in no way affected the provisions of these instruments. The jury apparently disregarded this fanciful claim, built upon conjectures, which was inconsistent with the mass of the testimony as to the relations of the testatrix and the Lothrop family. The appellants lay great stress upon their exception to the refusal of the court to reinstate the testimony of the witness Ferrier, which had been stricken out as too remote. This testimony was to the effect that about 20 years before the execution of this will he had seen Lothrop and Hannah Wilbur together in the Lothrop house when the other members of the Lothrop family were away from home and that Lothrop had sent him out of the house to work in the barn. The ruling of the justice was without error. The testimony in question was remote in point of time and also was without bearing upon the issues involved. Whatever might be said of this occurrence, if established, it never came to the knowledge of the testatrix and must have been unconnected with any influence which Lothrop had acquired over the mind of the testatrix, even if the jury should accept

the unusual psychological theory of the appellants

The appellants' exceptions are all overruled and the appeals are remitted to the Superior Court for further proceedings following the verdict

For Jonathan Andrews: Bliss & Walsh.

For Charles Andrews et al.: Walling & Walling.

For Defendant: Tillinghast & Collins.

SUPREME COURT

Sarah J. Atkinson vs. }
Margaret Birmingham } Ex. &c. No. 5557
et al. }

OPINION

(Before Brown, J., Below.)

SWEETLAND, C. J. This is an action of trespass upon the case for the alleged malicious prosecution of the plaintiff by the defendants, Margaret Birmingham, James J. Costigan, a Captain of Police of Providence, and George W. Hindmarsh, a police officer of said city.

The case was tried in the Superior Court before Mr. Justice Brown sitting with a jury. At the conclusion of the evidence said justice, upon motion of the defendants, directed a verdict in their favor. The cause is before us upon the plaintiff's exception to this action of said justice. In her bill the plaintiff has included exceptions to other rulings of said justice made in the course of the trial. The plaintiff has not pressed before us the exceptions last mentioned. As the rulings, to which such exceptions were taken, did not affect the verdict directed, we assume that the plaintiff has abandoned them.

By the uncontradicted evidence presented at the trial the following facts appear. On the afternoon of December 4, 1918, while walking westerly towards Prairie avenue along the northerly side-

walk on Chester avenue in Providence, the defendant, Margaret Birmingham, lost from her open handbag a five dollar bill and a two dollar bill folded together. A little later the plaintiff, Sarah J. Atkinson, while walking easterly on said sidewalk saw some paper money lying on the ground, picked it up, and said to the witness, Crown, who was present, that the money was hers. Later, the defendant, Birmingham, while searching along Chester avenue, learned from the witness, Todd, that the plaintiff had found some money on the sidewalk. The defendant, Birmingham, then went to the plaintiff's house and demanded that the plaintiff deliver to her seven dollars, the amount which she had lost. The plaintiff offered to turn over to the defendant, Birmingham, two dollars, which the plaintiff claimed was all that she had found. The defendant, Birmingham, reported her loss and the facts which she had learned to the defendant, Costigan, who was Captain of the police precinct in which Chester avenue is situated. The defendant, Costigan, directed his subordinate, the defendant Hindmarsh, to interview the plaintiff, in company with Mrs. Birmingham, and later he directed said Hindmarsh, in company with another subordinate officer named Griffin, to interview the witness Crown, who was present at the time the plaintiff picked up the money on Chester avenue, and also to interview the witness Todd, who saw the plaintiff pick up money from the sidewalk. The defendant Hindmarsh and officer Griffin reported to Captain Costigan the result of their interviews with the witnesses Crown and Todd to the effect that Crown said he saw Mrs. Atkinson pick up bills folded together and that there was more than one bill, that the witness Todd said that on the afternoon in question while she was sitting at a window of her house overlooking Chester avenue she saw the plain-

tiff pick up money lying on the sidewalk; that Mrs. Atkinson unfolded the money and she saw that there was more than one bill. Captain Costigan, himself, interviewed Mrs. Todd, who repeated the same story that Hindmarsh and Griffin had reported. He also interviewed the plaintiff, who denied that she had found more than a two dollar bill and expressed her willingness to deliver that to the defendant Birmingham. Captain Costigan then reported the above facts to the Deputy Chief of Police and requested that a criminal complaint be made against the plaintiff charging her with the larceny of seven dollars from Mrs. Birmingham. Upon the complaint of the Deputy Chief, the District Court of the Sixth Judicial District issued its warrant, the plaintiff was arraigned up the complaint, pleaded not guilty and was tried. Upon trial the plaintiff was found not guilty by the district court and thereafter she commenced this action against said Birmingham, Costigan and Hindmarsh to recover damages for her alleged malicious prosecution by them.

In order to recover against either of these defendants the plaintiff must establish by a preponderance of evidence that such defendant caused or assisted in causing criminal prosecution to be instituted against her. As to the defendant Birmingham, it appears that she truthfully reported the facts within her knowledge to Captain Costigan and that she neither induced nor requested the police authorities to commence said criminal proceeding, nor assisted in its prosecution save that when summoned by the police she testified as a witness for the complainant. As to the defendant Hindmarsh it appears that his sole connection with the matter was to follow the direction of his superior officer and to report to such superior officer the result of his interviews with the plaintiff and the witnesses Crown and Todd and later

when summoned as a witness he testified as to such interviews. The justice was clearly warranted in ruling that there was no evidence before the jury that either of the defendants Birmingham and Hindmarsh had procured or had assisted in procuring the criminal prosecution of the plaintiff or had recommended or requested the same. There was no error in the ruling of said justice directing a verdict in favor of the defendants Birmingham and Hindmarsh.

With reference to the defendant Costigan it must be held that he was mainly responsible for the prosecution of the plaintiff. Hereafter in this opinion he will be referred to as "the defendant." In accordance with the practice of the Providence Police Department a criminal complaint instituted by the police is ordinarily preferred by the Deputy Chief of Police in whose precinct the alleged offence has been committed and who has made an investigation of the matter. The complaint against the plaintiff was formally made and sworn to by the Deputy Chief after he had been informed of the facts relied upon by the defendant and had approved of the defendant's conclusion. But the Deputy Chief was induced to act by reason of the recommendation and request of the defendant.

To warrant holding the defendant liable in this action the plaintiff must establish by a preponderance of evidence that in prosecuting her upon the charge of larceny the defendant was acting without probable cause and also with malice toward her. From this investigation and the reports received from the investigations of his subordinate officers the defendant might not unreasonably believe that the money which the plaintiff found belonged to the defendant Birmingham; that she found a five dollar bill as well as a two dollar bill; that at the time of finding the money she had the intention of appropriating it, at least until she

discovered the owner, and that when the money was demanded of her by the owner the plaintiff persisted in her intention of appropriating five dollars of the amount. These facts alone, however, did not constitute probable cause for the charge of larceny against the plaintiff.

To render the finder of lost property guilty of larceny such finder must appropriate the same to his own use at the time of finding, when at that time he knows who the owner is or has the immediate means of ascertaining that fact. If for the first time the finder learns the identity of the owner subsequent to the finding and then denies the finding or refuses to deliver the property to the owner such finder may be civilly liable for conversion, but is not guilty of the crime of larceny; for in such circumstances the finder is held not to have taken and carried away the lost property, feloniously, from the actual or constructive possession of the owner. There is no evidence that the plaintiff at the time of the finding knew who was the owner of the money which she picked up and the circumstances indicate that she did not. The owner was not in sight. There was no mark upon the money and at the time the plaintiff was clearly without means of ascertaining the owner. In such circumstances the original taking of the money was not felonious and the plaintiff was not guilty of larceny. It must be held therefore that the facts in the possession of the defendant did not furnish ground for the opinion that the plaintiff was guilty of larceny. There was a lack of probable cause for instituting the criminal proceeding against the plaintiff. The defendant and his superior officers were acting under a misapprehension as to the facts and circumstances which in law constitute the crime of larceny in the finder of lost property. From the evidence it is plain that they erroneously, though honestly, believed that the

finder's refusal to deliver the lost property to the owner upon demand amounted to the larceny of such property.

Although the defendant caused the prosecution of the plaintiff without probable cause there is an entire lack of evidence that in so doing he was acting with malice toward her. The question of malice is ordinarily for the determination of the jury; but that question should not be submitted to them in the absence of facts which would warrant a finding of malice.

It is frequently said that the action of malicious prosecution is not favored in the law. Probably no form of action at law can be said to be a favored one, or one which can be successfully maintained without sufficient proof of its essential elements. This court has approved the principle that public policy requires the protection of those who in good faith and upon reasonable ground have instituted criminal proceedings. *Fox vs. Smith*, 25 R. I. 255. This perhaps amounts to no more than saying that no one shall be found liable in this form of action for instituting a criminal prosecution unless it is made to appear clearly that he acted without probable cause and with malice. Any favorable view, however, which the law is inclined to take with reference to the acts of those who commence criminal prosecution surely should be applied to the acts of peace officers who are charged with the duty of protecting the persons and property of citizens and maintaining good order in the community. A captain of police, however, cannot escape liability if he acts without probable cause and with ill-will or with a wanton disregard of the rights of others. There is no evidence of ill-will on the part of the defendant toward the plaintiff. Before this matter arose he had never seen or heard of either the plaintiff or Mrs. Birmingham. His con-

duct toward the plaintiff was neither reckless nor oppressive. He did not act until after reasonable investigation and then in accordance with what he believed to be a public duty. He did not cause the arrest of the plaintiff, but gave her ample notice that she might procure bail and voluntarily appear before the district court, there to be apprehended, arraigned and released upon entering into a recognizance of her appearance for trial.

As a result of his investigation the defendant might conclude that the plaintiff had found and still had in her possession the seven dollars lost by Mrs. Birmingham. He then acted upon his erroneous theory as to the law, i. e., if the plaintiff persisted in retaining the seven dollars after the owner had been disclosed to her and had demanded the delivery of the money, she thereby committed the crime of larceny. The defendant testified that he informed the plaintiff that if she did not return the money he would proceed against her for larceny and he further testified that he commenced the criminal proceeding because the plaintiff did not return to Mrs. Birmingham the money which the plaintiff had found. This conduct on the part of the defendant does not warrant an application of the doctrine that malice is shown if it appears that criminal proceedings have been instituted for the private purpose of collecting a debt or enforcing a civil claim and not for the purpose of vindicating the law. It is perfectly plain that the defendant throughout was acting without private interest and in the performance of what he in good faith regarded as his public duty. His conduct as indicated by his testimony, to which we have just referred, is consistent with such purpose. In the defendant's view the crime of larceny was committed by the plaintiff only in the event

that she retained the money after demand by the owner. His statement to the plaintiff was in accordance with that view. In effect the defendant told the plaintiff that if she did not deliver the money to the owner she would be guilty of larceny, and if she persisted in her refusal he should be obliged to charge her with that offence. The act of the defendant was intended in support of the law and not for the collection of a private debt.

The doctrine is established that malice be inferred from a want of probable cause. This inference can not be permitted, however, when the evidence showing a lack of probable cause also shows the absence of both ill-will and oppression.

For the reasons which we have indicated above we find that although there was an absence of probable cause for the criminal prosecution of the plaintiff, there is no evidence that the defendant Costigan acted with malice toward her. The plaintiff's exception is overruled. The case is remitted to the Superior Court for the entry of judgment on the verdict.

DISSENTING OPINION

STEARNS, J., dissenting. It is agreed that there was no probable cause for the criminal proceeding. The trial justice did not rule on the question of malice, which was not material if there was probable cause. The plaintiff having established want of probable cause is entitled to recover in her action of malicious prosecution upon proof of either actual malice or malice implied in law, or, as it is sometimes called, constructive malice.

Plaintiff is a married woman of good reputation who has lived in Providence for a number of years. The defendant Costigan, who is a police captain in the

city of Providence, knew all of the facts of the case, before he began the criminal proceeding. No crime had been committed and the plaintiff asserted her innocence. Captain Costigan then threatened plaintiff with a criminal prosecution unless she paid to the defendant Birmingham the seven dollars which the latter claimed she had lost. Upon plaintiff's refusal to do as directed, the criminal proceeding was begun.

Without any further consideration of the testimony, I think this action of the officer is a sufficient basis to warrant a jury in finding the existence of malice. It was an attempt to coerce plaintiff and a threat to use the machinery of the criminal law by a public officer to enforce the collection of a civil and individual claim. It may be that a jury, in view of the circumstances, might refuse to compel defendant Costigan to pay damages to plaintiff; but plaintiff, in my judgment, has the right to submit her case to a jury. The question on the direction of a verdict is not one in regard to the weight of the evidence of malice; if there is, it is a question for the jury in the first instance, and is not a question of law.

The case against the defendant Costigan should be submitted to a jury. Plaintiff does not urge the case against the other defendants very strongly and with reason, as there is but little evidence against them.

Plaintiff's exception to the action of the trial justice in directing a verdict for defendant Costigan should be sustained and the case should be remitted to the Superior Court for a new trial as to him.

I am authorized to state that Mr. Justice Sweeney concurs in this opinion.

For Plaintiff: Charles R. Easton.

For Defendants: Elmer S. Chase and W. R. Prescott.

SUPREME COURT

John A. Fritz
et al.

vs.

Walter A. Presbrey
et al.

} Equity No. 539

Patrick Louis Monahan
et al.

vs.

Walter A. Presbrey
et al.

} Equity No. 540

OPINION

(Before Tanner, P. J., Below.)

SWEETLAND, C. J. The above entitled proceedings are bills in equity filed by certain complainants who allege that in the city of Providence they have been duly licensed to engage in the business of transporting passengers for hire by means of motor vehicles, termed "motor buses" under the provisions of Chapter 1273, Public Laws 1915, and popularly called "jitneys."

The complainants seek to restrain the Board of Police Commissioners and the Superintendent of Police of Providence from enforcing against the complainants the provisions of a certain ordinance of said city regulating the operation of motor buses, and prescribing and limiting the route or routes to be traveled by such motor buses within said city.

The causes were tried before a justice of the Superior Court upon the prayer of each complainant for a temporary injunction. By his decrees said justice granted these prayers and temporarily restrained the respondent Board and Superintendent from enforcing said ordinance. The causes are now before us upon the respondent's appeals from said decrees.

The ordinance in question prescribes that motor buses shall not be operated within a specified area in the center of

the retail business section of Providence. In accordance with the direction contained in said ordinance the Board of Police Commissioners have fixed locations for the termini of motor buses just without said prescribed area. The objections of the complainants are that said ordinance and the action of the Board of Police Commissioners pursuant thereto are gross abuses of the regulatory power of the city council; that said ordinance is unreasonable, unjust and discriminatory; that its provisions are unrelated to public safety or convenience, and that the complainants, because they are prevented from transporting their passengers through said area, and to its center, have been affected in their business and have suffered and are likely to suffer pecuniary loss.

Said ordinance was adopted in reliance upon authority given by Chapter 1263, Public Laws 1915. Said statute, among other things, provides that any city or town council may by ordinance make such general rules and regulations governing the use and operation of motor buses in the streets and public places of such city or town as it may deem necessary or desirable for the public safety, welfare and convenience and "especially to prevent congestion of traffic, may itself, or by such officer, board or commission as it may authorize, prescribe and limit the route or routes to be traveled by such motor buses, respectively" and further any city or town council may prescribe that no motor bus shall be operated within such city or town without a special annual license therefor. Section 6 of the Motor Bus Ordinance of the city of Providence, as amended by Chapter 276 of the ordinances of said city approved December 20, 1920, provides for such special annual license and further provides that "Every motor bus license shall be subject to the condition that if at any time legal provision is made pre-

scribing, limiting, altering or abolishing any route or routes to be traveled by motor buses, such licensee and the bus licensed shall be subject thereto and operated accordingly."

It is manifest that by Chapter 1263 of the Public Laws the General Assembly intended to delegate to the city council of Providence, in common with the other city and town councils of the state, a part of its police power. Within the territorial limits of Providence, for the public safety and convenience, the city council was authorized to regulate the business of operating motor buses, and in order to prevent congestion of traffic it might prescribe and limit the routes which motor buses should travel. These considerations of public welfare undoubtedly present a field for the exercise of the police power.

At the outset in the consideration of this matter we are met by the contention of the respondents that the Superior Court and this Court is without jurisdiction to inquire into or pass upon the question of whether this ordinance is unreasonable, oppressive and not conducive to public safety and convenience, because the ordinance was not adopted by virtue of any implied power of the city council but upon an express grant of power from the General Assembly. We cannot agree with this contention of the respondents. The opinions of the courts in other jurisdictions cited by the respondents as authorities for their positions do not, when analyzed, support but are opposed to the respondents' claims. The correct rule is that set out in the very able and comprehensive brief and argument of counsel for the complainants. If an ordinance is passed in virtue of and in exact conformity with an express grant of legislative power in which the manner of its exercise is prescribed in definite and precise terms, a court will not pass upon the validity of such an ordinance. The

attack, if any, must be made against the constitutionality of the enabling statute. Such a case would have been presented if the General Assembly had in express terms empowered the city council to exclude the operation of motor buses upon the area defined in the ordinance now under consideration. The power given to the city council by Chapter 1263 of the Public Laws to prescribe and limit the routes of motor buses is expressly granted, but in general terms, and the mode of its exercise is left to the discretion of the city council. As to ordinance passed under such a grant of power or as to those adopted in reliance upon general implied powers, the courts will consider their reasonableness and pass directly upon their validity. *State vs. Mayo*, 106 Me. 62; *In re Anderson*, 69 Neb. 686; *City of Emporia vs. Railway Co.*, 94 Kan. 718; *Phillips vs. City of Denver*, 19. Colo. 179; *Haynes vs. Cape May*, 50 N. J. L. 55; *Chicago vs. Ripley*, 249 Ill. 466; *City of Lakeview vs. Tate*, 130 Ill. 247; *Shelbyville vs. Cleveland, etc., Ry. Co.*, 146 Ind. 66.

In considering the reasonableness of the ordinance in question, passed under the delegated police power of the state, the court will apply to its provisions the tests which are applicable in determining the validity and constitutionality of a statute having a like purpose. When called upon courts will scrutinize legislation purporting to be enacted for the public welfare to see if the object sought calls for the exercise of the police power. If such object can fairly be said to be a regulation to promote the safety, health, morals, comfort or convenience of the community, then courts will not interfere with the wide scope of legislative discretion in determining the policy to be employed in its exercise, unless it appears that the discretion has been abused and the legislative action is so clearly

unreasonable and arbitrary as to be oppressive. In *East Shore Land Co. vs. Peckham*, 33 R. I. 541 at 548, this court said, "All statutes are presumed to be valid and constitutional and the burden of proving the unconstitutionality of any statute is upon the party raising the question; furthermore, the rule is that he must prove it beyond a reasonable doubt." In *State vs. Narragansett*, 16 R. I. 424, at 440, the court said, "The rule generally laid down is, that statutes should be sustained unless their unconstitutionality is clearly beyond a reasonable doubt. A reasonable doubt is to be resolved in favor of legislative action and the act sustained." Also see *Cleveland vs. Tripp*, 13 R. I. 50. In the "Opinion to the Governor," 24 R. I. 603, it was said "Both this court in *State vs. Peckham*, 3 R. I. 289, and the Supreme Court of the United States in *Munn vs. People*, 94 U. S. 113, have declared that the legislature in the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation it is to be presumed that it did exist." The complainants' criticism of the language of the court in some of these cases indicates a misconception of the nature of an inquiry as to the constitutionality of an act of the General Assembly. The ordinary rules as to proof have no application in such proceeding. The inquiry is a consideration by this court in regard to the constitutional propriety of the act of a co-ordinate branch of the government. Before this court will declare the unconstitutionality of such an act in either a civil or criminal proceeding, the court must be convinced of the invalidity beyond a reasonable doubt. In delivering the opinion of the court in *Wellington et al.*, Petitioner, 16 Pick. 87, at 95, Chief Justice Shaw said: "When called upon

to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, the courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment beyond reasonable doubt." In *Horton vs. Old Colony Bill Posting Co.*, 36 R. I. 507, the court in declaring the validity of the so-called Billboard Ordinance, adopted by the Providence City Council, held that "In view of the fact that the lawmaking body has far more opportunity to ascertain and meet the public need than the court can have, and in view of the wide latitude permitted the legislative branch in determining the public needs and the appropriate remedies, the court should uphold the limitations on size imposed by this section, which in our opinion are not clearly unreasonable."

The regulation of vehicular traffic in the crowded streets of the city of Providence for the purpose of promoting the safety and convenience of the people using those streets presents a proper subject for the exercise of the public power. Whether the policy of the city council, embodied in the ordinance, presents the best scheme of regulation is not a judicial question. The complainants should not be granted an injunction, permanent or temporary, until they have established unmistakably that the ordinance in question is an arbitrary exercise of power or that its provisions have no reasonable relation to the promotion of the safety and convenience of the public, as a whole, in its use of the highways within said prescribed area. This the complainants have failed to do. They do not question that the traffic congestion in the streets

and public places included in said area is the greatest in the city; that the city council has endeavored to relieve this congestion by restricting the length of time that vehicles may stand in said streets and public places, by entirely prohibiting such standing in some locations, by stationing traffic policemen in various places in such area to direct the movement of traffic, and by providing that in some of said streets traffic shall proceed in one direction only. The complainants have not attempted to deny that the removal of the business of operating motor buses from this area will tend to promote the safe and convenient use of the highways therein by the community generally. At the hearing before said justice the complainants presented the testimony of two witnesses, who said they sometimes patronized motor buses operating on Broadway, and that they found the terminus of that line without said area less convenient for them than the former terminus within said area. Undoubtedly many witnesses might be produced who would give similar testimony. The city council sought to relieve to some degree the congestion in the most congested district of the city, and for the public safety, welfare and convenience removed the business of operating motor buses from that district. The testimony of patrons of such buses that, as to them, the new termini were less convenient than the old does not tend to establish that the removal of said buses from the district did not relieve such congestion and that the safety, welfare and convenience of the large number of persons using the streets of said district at all hours of the day were not promoted thereby, or that the policy adopted by city council has no reasonable relation to the legitimate objects sought. The only other matter presented to said justice was the testimony of several holders of motor buses

licenses to the effect that since the change in termini there has been a decrease in the number of their passengers and a consequent falling off in their receipts from fares. This, however, in the circumstances furnishes no ground for relief. As we have seen above the ordinance was an exercise of delegated police power directed toward an object well within the scope of that power and having a reasonable relation thereto. Although it may have resulted in pecuniary loss to the licensees, that does not render the ordinance invalid unless it is plainly shown that it was adopted in arbitrary and oppressive disregard of their rights. There was nothing produced at the hearing which would warrant such a finding. The licensees are subject to the ordinary rule, that the individual is without relief if he finds his business injuriously affected by a proper exercise of police power. In this case though such licensees may regret the result, they have no ground for complaint, for they accepted licenses which contained the express provision that they were subject at any time to a legal provision prescribing, limiting, altering or abolishing any route or routes to be traveled by motor buses.

There was nothing before the Superior Court that would warrant a finding that the ordinance in question was invalid. Everything points to its validity. The ordinance being valid, it was error to stay its operation by temporary injunction. It appears from the decision of said justice upon which the decrees were based that he felt constrained to grant the injunction upon what he regarded as the balance of convenience between the parties. The principle of the balance of convenience is without application in favor of a complainant who is himself without legal right and is seeking to restrain a lawful act. This court

has approved the rule that the issuance of a preliminary injunction rests in the sound discretion of the court; but an injunction will not be supported when it is clear that the Court's discretion has been exercised in an illegal manner or in favor of a complainant who has not made out a *prima facie* case for relief. *Rhodes Bros. Co. vs. Musicians Union*, 37 R. I. 281, 290; *Armour vs. Hall*, 38 R. I. 300; *Blackstone Hall Co. vs. R. I. Hospital Trust Co.*, 39 R. I. 69.

The decrees appealed from are reversed. The injunctions granted are vacated and the causes are remanded to the Superior Court for further proceedings.

DISSENTING OPINION

SWEENEY, J., Dissenting. I agree with the opinion of the court, in which they held that the Superior Court has jurisdiction to hear and determine the question of the reasonableness of the ordinance; but respectfully dissent from their conclusion reversing the decrees granting the preliminary injunctions, and my reasons for dissenting are as follows:

As has been stated, these appeals are before this court upon the respondents' appeals from decrees of the Superior Court granting preliminary injunctions, restraining the respondents from enforcing an ordinance passed by the City Council of Providence.

It appears from the bills of complaint that the complainants operate motor buses in said city, and they allege that the ordinance is unreasonable, unjust and discriminatory; that it is a great abuse of regulatory power, and that its enforcement will result in the destruction and prohibition of their business and cause them irreparable loss, injury and damage.

The respondents do not attack the insufficiency of the allegations of fact in

the bills of complaint, nor their want of equity, by demurrer, as they should do, if such were apparent upon an inspection of the bills of complaint. *Allen vs. Woonsocket Co.*, 11 R. I. 288. On the contrary, they impliedly admit the sufficiency of the bills by filing answers, admitting some of the facts alleged in the bills, and denying others, and the cases are ready for the framing of issues of fact, and the trial thereof.

At the hearing in the Superior Court on the question of fact—the unreasonableness of the ordinance—upon the testimony adduced, the court was of the opinion that the evidence required the granting of preliminary injunctions to protect the rights of the complainants from irreparable injury and damage. The respondents, deeming themselves aggrieved by the granting of said injunctions, claimed appeals therefrom to this court, as authorized by Sec. 34, Chapter 289, General Laws of 1909. This section, permitting an appeal from the granting of an injunction in the Superior Court, provides, among other things, that "The appeal shall transfer to the Supreme Court only the question whether the decree appealed from shall be affirmed, reversed or altered." Said section also requires the appellants to "file claim of appeal, with a statement of the reasons therefor."

The respondents state, as the only reasons for their appeals (1) that the decrees granting the injunctions are contrary to law; and (2) that the Superior Court improperly granted injunctions by mistake and error of law. In their printed brief the respondents state the questions raised by them under their reasons of appeal as follows:

"1. Was the question whether the ordinance was reasonable a question that would be determined by the Superior Court?

"2. Did the Superior Court have any

discretion to grant an injunction?"

The respondents argue, under question 1, that "the question whether the ordinance was reasonable was not a question that could be determined by the Superior Court;" and under question 2 they argue that "the Superior Court had had no discretion in the matter of granting an interlocutory injunction." In concluding their argument of these questions, on page 41 of their brief, they say, "This line of consideration, which need be pursued no further, reduces to an absurdity the suggestions, that ordinances of this character, enacted in pursuance of a statute of the character here under discussion, are subject to the test of a court's approval.

"The Superior Court, in granting these preliminary injunctions, committed error in law."

This court, after careful consideration of the argument of the appellants, has decided that the ordinance in question, being passed under general legislative authority, is subject to judicial review as to its reasonableness, and therefore the Superior Court has jurisdiction of the question.

It being held that the Superior Court has jurisdiction of the subject matter, its authority to issue a preliminary injunction, in the exercise of judicial discretion, is inherent and unquestionable.

In the claims of appeal it is not stated that the decrees of the Superior Court in granting the preliminary injunctions were against the evidence, or the weight thereof; and the only questions raised by the respondents in this court in their claim of appeal, and argued in their brief, are those of law denying the jurisdiction of the Superior Court to hear and determine the question of the reasonableness of the ordinance, and the power of that court to grant an injunction.

In trying to sustain their appeals, the

appellants are restricted to the reasons stated by them in their claims of appeal.

The effect of an appeal in an equity cause, and the necessity of a sufficient statement of the reasons of appeal, has been discussed by this court in a carefully prepared opinion in the cause of *Vaill vs. McPhail*, 34 R. I. 361, wherein the court states on pages 363, 364, "If, however, the appeal removes nothing to this court except the errors appearing upon the record and complained of by the appellant, then the statement of the reasons of appeal should be specific; should be as full as the claim of the appellant, and must be regarded as the jurisdictional basis of the cause in this court, limiting all subsequent proceedings here." The court further says, page 371, "Certain incidental and subordinate jurisdiction over the cause is given to this court pending the appeal, but the general effect of the appeal is to bring before the Supreme Court for review merely the errors stated in the appellant's reasons of appeal." And the court holds that, "In conformity with our view of the nature of equity appeals in this State, we hold it essential that the appellant should clearly indicate in his reasons of appeal the particular errors of the Superior Court of which he complains and which he seeks to have reviewed. These reasons should be stated separately and specifically. The statement of reasons of appeal which the statute requires is a statement of the erroneous rulings, orders or decrees of which the appellant complains." Page 373. The opinion concludes the discussion of this subject by saying, "The consideration of the alleged errors which they have thus designated they will be restricted in the proceedings before this court." Page 376.

There is a presumption in favor of the validity of the ordinance; but this pre-

sumption is a rebuttable one and may be overcome by testimony produced by the person attacking its validity. In the instant cases the complainants attacked the validity of the ordinance and introduced sufficient testimony to require the court, in the exercise of its discretion, to enter decrees granting preliminary injunction to protect the rights of the complainants from irreparable injury and damage.

The respondents do not claim that the entry of these decrees was contrary to the evidence or to the weight thereof and, under their limited reasons of appeal, this ground cannot now be considered as a reason for reversing said decrees, and the respondents have not argued such a ground.

As the question of the sufficiency of the evidence show the unreasonableness of the ordinance to require the issuance of the injunctions is not before this court on the reasons of appeal, I refrain from discussing it.

This court having decided that the Superior Court had jurisdiction of the question of the reasonableness of the ordinance; and as the question of its reasonableness is dependent upon the testimony introduced by the complainants and respondents; and the court having found that the testimony required the granting of the preliminary injunction to protect the rights of the complainants from irreparable injury and damage; and there being no claim by the respondents that this finding of the court is against the evidence or the weight thereof; under the law, and the issues before this court, the decrees appealed from should be affirmed.

For Complainants: Albert B. West, Anthony V. Pettine and Wm. W. Blodgett.

For Respondents: Elmer S. Chace and Oscar W. Heltzen.

SUPREME COURT

Crystal Spring Co.
vs.

Carrie Cornell

Ex. &c. No. 5465

OPINION

(Before Brown, J., Below.)

VINCENT, J. This is an action of trespass on the case for negligence brought by the Crystal Spring Company, a corporation organized under the laws of Rhode Island and located and doing business at Seekonk in the Commonwealth of Massachusetts, against Carrie Cornell, of Barrington, in the State of Rhode Island, to recover damages arising from a collision between a truck belonging to the plaintiff corporation and the touring car of the defendant.

The case was tried in the Superior Court before a justice thereof sitting with a jury. A verdict was rendered for the defendant and later the motion of the plaintiff for a new trial was denied by the trial justice.

The case is now before us upon the exceptions of the plaintiff to certain portions of the charge; to the refusal of certain requests to charge; and the denial of the motion for a new trial.

At the trial in the Superior Court the plaintiff produced but one witness, Robert S. Brown, who was practically the sole owner of the plaintiff corporation. He testified that on the afternoon of the day of the accident he was driving his truck in a northerly direction on Pawtucket avenue, East Providence; that he overtook and attempted to pass another truck going in the same direction; that upon giving the usual signal the truck in front of him pulled to its right upon the tar construction which was at that point about fifteen or sixteen feet wide; that outside of the tar construction on

each side of the road were car tracks; that he pulled out to his left and was alongside the truck, which he was attempting to pass, when the defendant's automobile appeared from around a curve about two hundred yards away; and that it was then obvious to him that there was not sufficient time in which to pass the truck and so he continued on beside it, trusting that the defendant would bear more to the right and give him ample room. He does not claim that he made any attempt to stop his truck, but says that he slackened his speed "watching to see what the other fellow would do."

He admits that he could have stopped within fifty feet and that he could have dropped behind the truck which he was attempting to pass, but that he kept on well over the center of the tar construction and that he was almost slowed down to about five miles an hour when the two cars came in collision and that the defendant's car was at that time going about the same speed.

He further testified that the defendant's car was traveling on its right-hand side of the road on the tar construction and that it remained on the tar construction until the time of the accident.

The plaintiff claims that the defendant's car should have been driven further to its right upon or over the street car tracks and that if this had been done there would have been sufficient room for the two trucks, going in one direction, and the defendant's car, going in the other, to have passed abreast.

Brown's truck had been proceeding behind four other cars. The defendant's driver says that he slowed down to about ten miles an hour when he saw the string of cars which he was approaching; that Brown's truck swung from behind these cars over to the left side of the road in front of him; that at that time the two

cars were not more than fifty feet apart; that he did everything possible to stop his car and although he reduced its speed to less than five miles an hour he was not able to avoid the collision; that he was not able to turn further to the right on account of the broken edge of the tar construction and also for the reason that outside of the tar construction the earth had been washed out forming a gutter so that the rail stuck up some four or five inches; and that any attempt to pass over it might have resulted in overturning his car.

It is undisputed that the cars came together head-on. The testimony of the driver was to some extent corroborated by the testimony of the two ladies who were in the automobile.

Upon this testimony the question of the defendant's negligence and the plaintiff's contributory negligence was left to the jury.

A person attempting to pass a car in front of him is bound to exercise a high degree of care and to see that the situation is such that he can safely do so. He should observe not only the space which he is intending to traverse but also the opportunities which an approaching car would have to pass him safely. If the condition of the edge of the tar construction or the unusual prominence of the rails of the car track were such as would limit the movement of the approaching car, they should have been observed by him. He should have known and appreciated the limitations of the approaching car and, if he found his surroundings were such that he could not pass or continue on with safety, it was incumbent upon him to either stop his car or drop back to the position which he had formerly occupied in rear of the other truck.

The jury rendered a verdict in favor of the defendant. We think that upon the testimony they might reasonably reach

the conclusion that the defendant was not negligent and that the accident was due to the improper operation of the plaintiff's truck, taking into consideration the condition of the roadway and the presence of the car tracks.

We do not find any merit in the exceptions of the plaintiff regarding the charge of the court and its refusals to charge. The matters contained in the plaintiff's requests had already been substantially covered by the charge of the court.

The plaintiff's exceptions are all overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the verdict.

For Plaintiff: William J. Brown.

For Defendant: Greenough, Easton & Cross.

SUPREME COURT

Danforth K. Barrett	} Ex. &c. No. 5503
vs.	
Rhode Island Co	

OPINION

(Before Doran, J., Below.)

VINCENT, J. This is an action of trespass on the case for negligence brought by Danforth K. Barrett against the Rhode Island Company to recover damages for injuries arising out of a collision between an automobile in which the plaintiff was riding and one of the cars of the defendant.

The case was tried in the Superior Court before a justice thereof sitting with a jury and a verdict was rendered for the plaintiff in the sum of \$4000.

The defendant's motion for a new trial was heard and denied by the trial justice and the case is now before us upon

exceptions of the defendant. These exceptions are five in number and cover the refusal of the trial justice to direct a verdict for the defendant; the refusal to charge as requested; and the denial of the motion for a new trial.

The plaintiff, at the time of the accident, was riding in an automobile upon the invitation of a friend who was the owner and driver thereof. The plaintiff was being taken from the central part of the city to his home on Forest street. The automobile, after passing through various streets, turned from North Main street into Doyle avenue and proceeded along the thoroughfare until it approached the corner of Camp street. The automobile was being driven at a speed of about thirteen miles an hour upon a moderately rising grade.

The driver of the automobile, with the intention of making a sweeping turn and going north on Camp street, first directed his course toward the southerly side of Doyle avenue in order to facilitate that movement. As the automobile approached the corner of Camp street, the driver thereof saw an electric car which had stopped at the southerly corner of Doyle avenue and Camp street to let off passengers. He continued on, making his turn to go north on the latter street, and when his front wheels reached the first rail of the car track the electric car and the automobile came together with sufficient force to throw the plaintiff forward and bring him in contact with the wind shield, through which he suffered some injury.

The vital question in the case seems to be: Did the car start up after the automobile got in front of it or did the automobile swing round in front of the car after the latter had gotten underway?

The plaintiff testified that when he first saw the electric car he was under the impression it was standing still, but was

not sure whether it was or not, as he paid no more attention to it until it was about to hit the automobile.

The driver of the car, Mr. Birtwhistle, testified in cross-examination that when his front wheels landed on the rail the car was only two or three feet away.

Miss Bradley, who worked under Mr. Birtwhistle at the Shepard Store, and who was a passenger on the electric car, testified that the latter had started when she saw the rear of the automobile rounding the corner and the crash occurred almost immediately.

Mr. Woodward heard the horn of the automobile after the car started. The horn was sounded, according to Mr. Birtwhistle, the driver, before he made the turn into Camp street.

Mr. Mathewson says that he saw the automobile turn the corner and disappear up Camp street before the electric car started. This is a brief summary of the testimony of the plaintiff and the four witnesses who testified in his behalf so far as the same relates to the respective movements of the two vehicles just prior to the collision.

From the testimony of Mr. Mathewson it is quite evident that he must have been mistaken. If the automobile had rounded the corner and disappeared up Camp street before the electric car started, the collision could not have occurred near to the place where the car had stopped to let off passengers and besides, if an automobile had passed beyond the car, the former would have been struck in the rear rather than on the side which the testimony shows was the place of contact.

There is some conflict of testimony as to whether the automobile first struck the side of the electric car and then swung round in front of it or reached the car track without such previous contact.

The determination of that particular question would be of little, if any, use in arriving at a conclusion as to the negligence of the defendant if the car was in motion at the time of either occurrence.

There is substantial testimony on behalf of the defendant, which we need not go into in detail, to the effect that the driver of the automobile undertook to pass in front of the electric car after the latter had started, and that the motor-man did all he could to avert the accident.

In fact there is very little in the testimony in behalf of the plaintiff bearing upon the question of the defendant's negligence.

The defendant's request to charge, which is the subject of the second exception, and which was denied by the trial court, is in the following words: "Although the negligence of the driver of an automobile is not to be charged to a passenger in the automobile, yet a passenger in an automobile sitting on the front seat must use some care of his own and if he allows, without protest on his part, himself to be driven into a place of danger in front of an electric car, the passenger may be found guilty of negligence separate and apart from that of the driver."

It is undoubtedly true that when the circumstances of the case warrant it the question of the contributory negligence of the passenger may be submitted to the jury under proper instructions. We think, however, that in the present case reasons. (1) Because the language is the request was properly refused for too broad. It carries the implication that the passenger must exercise some care or make some protest against the action of the driver if he would escape the charge of contributory negligence. The question for the jury is whether under

SUPREME COURT

Jared L. Greene, Guar-
dian, App.

vs.

Town Council of War-
wick

Ex. &c. No. 5544

RESCRIPT

(Before Tanner, P. J., Below)

This appeal is now before this court upon the appellant's bill of exception to the decision of the presiding justice of the Superior Court affirming an order of the Town Council of Warwick, entered on the 9th day of November, 1920, directing the town sergeant of said town to forthwith remove so much of the appellant's building as encroached upon the public highway in said town. This order of the town council was passed as the result of the appellant's refusal to remove that portion of his building encroaching upon said highway in accordance with a vote of said council ordering him to do so, passed on the 13th day of July, 1920.

The appellant claimed an appeal to the Superior Court from the order of the town council upon several grounds but the only exception now claimed by him is that the decision of the presiding justice is against the evidence and the weight thereof.

It appears from the evidence that August 12, 1850, the town council of said town voted to accept the report of a committee, duly appointed to lay out a highway according to a plat accompanying said report and ordered the report and plat recorded and the highway established and laid open according to law. The plat was made May 13, 1850, and shows the highway to be two and one-half rods wide from the southeast corner of Collins' lot, so-called, to the shore at Rocky Point.

The appellee claims that the appel-

the particular circumstances of the case the plaintiff was negligent in failing to apprise the driver of the danger. The defendant's request is, from its language, open to the objection that it requires the passenger to do something for which he may have no warrant or opportunity. (2.) We find here no evidence which would require the trial court to charge the jury as to the negligence of the plaintiff and therefore the refusal of the request was not harmful to the defendant.

While the denial of the motion for a new trial by the trial justice is entitled to and is usually given much consideration by this court, we do not feel that it is controlling in the present case. All that the trial justice is able to say bearing on the preponderance of the evidence is, "I cannot say that there was no basis for the jury's finding that the motor-man was negligent."

From this language it may be reasonably inferred that the trial justice had found but little to support the plaintiff's case.

In regard to the amount of damages awarded by the jury, the trial justice says that they are excessive in his judgment, but that he did not see his way clear to make any reduction.

We do not feel altogether warranted in sending the case back for the entry of judgment for the defendant, but we think that justice requires that there should be a new trial.

The defendant's exceptions numbered 1 and 2 are overruled, those numbered 3, 4 and 5 are sustained, and the case is remitted to the Superior Court with direction to give the defendant a new trial.

For Plaintiff: Huddy, Emerson & Moulton.

For Defendant: Clifford Whipple and Alonzo Williams.

lant's building encroaches upon the easterly line of said highway from 4.15 feet to 6.25 feet, and the appellant denies that any portion of his building extends into the highway; but it was admitted by the appellant's attorney, during the argument of the case, that his evidence showed that a portion of the piazza in front of the building was within the limits of the highway.

According to the accepted report and plat, the starting point used by the committee and their surveyor in laying out the highway in 1850 was the southeast corner of the Collins' lot, so-called. The Collins' lot is a well-known tract of land and its title has been traced and identified by deeds, introduced in evidence, from 1756 to 1900.

The appellant's surveyor testified that the proper method of locating the line of the highway would be to ascertain the southeast corner of the Collins' lot and then run the line from that point; but he claimed that on account of lapse of time and there being nothing to indicate this essential starting point he had not attempted to locate it but had only located the present occupation lines.

The town's surveyor, Mr. Robert C. Greene, testified that he was seventy-three years old, had lived in Warwick all of his life, and had been surveying since 1875. He testified that he had known the Collins' lot for many years; that in the year 1900 it had a stone wall about four feet high around it; and that he remembered this wall ever since he could remember anything.

Mr. Greene testified that in 1903 he ran out the lines of the Collins' lot for the owner; and that in running these lines he took the center of this old stone wall. He also testified that soon after this he gave his notes of this survey to Mr. Waterman, another surveyor, who platted the Collins' lot into building sites and set a

granite bound at the southeast corner of the plat; that this granite bound was at the southeast corner of the Collins' lot; that this bound was taken by him as his starting point in making the plat for the town in order to locate the lines of the highway and determine whether or not the appellant's building encroached upon it; and that the building did encroach upon the highway.

At the request of the attorney for the appellant, the court took a view of the highway and among other objects called to the attention of the court was a stone bound set in the ground on the westerly side of the highway, and identified by surveyor Greene as being set at the southeast corner of the Collins' lot.

After a careful consideration of the evidence, the court finds no error in the decision of the presiding justice of the Superior Court affirming the order of the town council appealed from. The appellant's exception is overruled and the case is remitted to the Superior Court for further proceedings.

For Appellant: E. M. and J. J. Sullivan.

For Appellee: Harold R. Curtis.

SUPREME COURT

Alice J. Law

vs.

Clara M. Barnes et al.

RESCRIPT

This is a bill in equity to set aside a conveyance of trust property by the trustee, and for the cancellation of the deed making such conveyance.

It appears that Albert Barnes, late of Gloucester, deceased, died possessed of certain real estate and by the residuary clause of his will he devised the same to his daughter, Clara M. Barnes, one of these respond-

ents, in trust to sell the same "as soon as it is deemed advantageous," having first procured the assent in writing of the testator's other children, Alice J. Law, the complainant, Frederick A. Barnes, the other respondent, and Henry L. Barnes, and upon sale to add the money obtained to the personal estate of the testator, the same to be divided equally among his said four children.

After procuring the written assent of her sister and her two brothers, the respondent, Clara M. Barnes, sold said real estate to the respondent, Frederick A. Barnes, for two thousand dollars and took his promissory note in payment.

The complainant seeks to set this sale aside for the reasons alleged in her bill, viz., that the price was inadequate; that the sale was not made for cash, and because the sale was collusive, in that the trustee received a personal advantage therefrom.

The case was tried before a justice of the Superior Court upon amended bill, answer and proof. Said justice found against the contention of the complainant, and after the respondent, Frederick A. Barnes, had paid his said promissory note to the trustee, said justice entered a decree dismissing the bill.

From an examination of the evidence, we cannot say that said justice was clearly wrong in finding that the price was adequate. The evidence justifies the conclusion that the complainant knew the extent of the land sold and had opportunity to obtain information as to its value; that she had known for some time before the sale that her brother was seeking to purchase for two thousand dollars and she raised no objection to that price, and that she freely signed the written assent for the sale and herself suggested that a promissory note should be taken for the purchase price. The complainant's contention that as a part

of the consideration for the deed the trustee reserved to herself the right to occupy a part of said real estate for ten years is not supported. This claim is based upon the voluntary undertaking of the respondent, Frederick A. Barnes, that until the father's estate was settled his sister, the trustee, might remain with her furniture in the house in which she had resided with her father.

The complainant's appeal is denied. The decree of the Superior Court is affirmed. The cause is remanded to the Superior Court for further proceedings.

For Petitioner: John L. Curran and Edward G. Carr.

For Respondent: James Harris.

SUPERIOR COURT

Mahmod Yuseff

vs

Karekin Berberian

RESCRIPT

BLODGETT, J. Case tried by the court; jury trial waived.

Action brought to recover balance due on a draft issued by Karekin and Levon Berberian to pay to the order of Kalif Yuseff, eighty Turkish pounds, and ordered to be paid by Garabed Effendi Berberian in Harpoot, Turkey, dated July 17, 1914. On the back of the draft a payment of five Turkish pounds, Sept. 30 (no year); Oct. 16, three pounds; Oct. 31, two pounds; Oct. 28, two pounds; Dec. 15, five pounds, and March 18, 1915, eighteen pounds, total of 35 pounds.

There also appears, according to the translation, the draft being in the Turkish language, the following: "Father has received 35 pounds over there you will pay 45 pounds to the son of Yuseff."

The plaintiff in the present case is the son of Yuseff, and the action is brought against one of the partners of

Berberian Brothers. Levon Berberian, the other partner, testified that \$360 in United States money was paid to his brother, Karekin, by Mahmod Yuseff, and that the money to meet the draft was forwarded to his uncle, Garabed Kerkerian, in Harpoot, Turkey; that since the beginning of the World War nothing has been heard of this man, and presumably he was a victim of Turkish atrocity; that he knows the handwriting of his uncle and that the handwriting on the back of this draft is not that of his uncle; that two different handwritings appear upon the back of the draft, neither of which is that of his uncle; that the money was sent through his representative in England; that his brother was at present in California and that the firm of Berberian Brothers was dissolved five years ago. He further testified the records of the co-partners would show the draft to have been paid, but that these records were in California. They were not produced at the trial. There was also testimony that when paid such a draft would be held by the payor.

Except an endorsement of certain payments on account the only transfer to the present holder is as before specified, and the present holder is the plaintiff in this action.

The word "you" as used in this transfer of ownership is held by plaintiff to refer to the Berberian in Providence by reason of the use of the words, "Father has received 35 pounds over there," and apparently this is the only reasonable construction that can be placed upon the language.

The only testimony as to acceptance of the draft is the notation upon the back thereof of certain payments, and there is no testimony that payment of the draft was refused.

The drawer of the bill before accept-

ance undertakes with the drawee and subsequent holders:

(a) That there is a drawee, and that he is capable of accepting.

(b) That he will accept.

Norton on Bills and Notes (Hornbook Series), 4th ed., p. 215.

The drawee of a bill, though he is designated as the person to make the payment, is a mere agent of the drawer; and the latter, therefore, since he undertakes for his agent's acts, "undertakes that the acceptance be made at all events."

Hibernia Nat'l Bank vs. Lacombe, 84 N. Y. 367.

The circumstances of the present case apparently are such as to emphasize the justice of this rule. The payee paid cash for the bill. Although the amount of the bill was presumably forwarded, the great war broke out and there is much doubt as to whether the money ever reached Harpoot, and as to whether the payee in Harpoot was alive at the time the draft reached its destination.

The fact as to the handwriting on the back of the draft being testified to as not the handwriting of the drawee might help to confirm this supposition.

The recourse for the payee would then be to look to the original drawer for payment, and that he has attempted to do in this action, giving credit to the drawer for certain payments apparently made in Harpoot in a somewhat irregular manner.

The present holder of the draft is the son of the original payee, and is the plaintiff in this action. While the indorsement upon the draft is not signed by the payee, yet the language of the indorsement is easily understood, and the plaintiff is the present holder of the draft.

Decision for plaintiff for \$183.25.

For Plaintiff: E. C. Stiness.

For Defendant: J. Rustigian.

SUPERIOR COURT

Catherine Wolk	}	Eq. No. 4282
vs		
Jacob Yablonsky	}	Eq. No. 4307
Lansing Lumber Co.		
vs	}	Eq. No. 4289
Catherine Wolk, et al		
Welsh & McGreen	}	Eq. No. 4275
vs		
Catherine Wolk, et al	}	Eq. No. 4308
Farber Cornice Co.		
vs	}	Eq. No. 4318
Catherine Wolk, et al		
Charles A. Packard	}	Eq. No. 4358
vs		
Gallagher & Mooney	}	
vs		
Catherine Wolk, et al	}	

RESCRIPT

March 7, 1922

BARROWS, J. Heard on exceptions to report of the master.

Case No. 4282 was a bill in equity, seeking, upon payment of the amount due, to restrain foreclosure of two mortgages or their cancellation if nothing was found to be due, on the ground that respondents, Needles and Ballon, were endeavoring to enforce said mortgages contrary to an agreement between complainant and respondent Yablonsky.

After hearing on issues of fact, the court declined to cancel said mortgages and referred the case to a master to find the amount, if any, due on them to respondent mortgagees.

The decree as entered does not show

that the court passed upon a question of fraud. Respondents' brief claims that it did so and found none, but retained jurisdiction for an accounting and sent the case to a master. The bill alleges fraud, if at all, only in connection with the transfer of the second mortgage and the issues framed nowhere mention fraud. We do not, therefore, believe that the case was erroneously referred to a master after failure to find fraud.

Wilcox vs. Frant, Eq. No. 449, decided by the Supreme Court, January 18, 1922.

Respondent Needles claims the full amount of the mortgage was advanced. Respondent Ballon claims \$1000.

Before the master six lien cases for materials furnished in the construction of the building involved in the mortgages above mentioned were consolidated with Equity No. 4282.

The master has filed his reports allowing priority over liens, for actual advances made pursuant to the mortgagee's contract on the first construction mortgage. This mortgage was recorded prior to the commencement of work and the master held that it was immaterial whether such advances were made before or after the materials or labor were furnished. This position is sound.

-27 Cyc. 1054.

The second mortgage was found to be worthless for failure of consideration.

The master further held that the liens were good only for materials furnished within 60 days of giving the notice to the land owner even though the contract under which the materials were furnished was an entire one. Evidently the bulk of authorities do not sustain this view.

27 Cyc. 145.

But the master was bound by a Rhode Island decision.

Newell vs. Campbell Machine Co., 17 R. I. 74.

If the rule in this State is to be reversed, it should be done by the Supreme Court, not by this court. We find no errors in the report of the master as to the various mechanic's liens.

The more troublesome question is as to the amount due upon the two mortgages to Yablonsky, one transferred subsequently to Needles, the other to Ballon. For all purposes of this case Ida Yablonsky and Jacob Yablonsky are one. Ida is Jacob's wife. She was a mere dummy in the transaction when the mortgage now held by Needles was taken in her name.

The first mortgage to Yablonsky was admittedly given as a construction mortgage. Yablonsky was a builder. The master was warranted in finding that Yablonsky's transferee Needles had full knowledge of these facts (pages 250, 251).

While the evidence shows a family relationship between Yablonsky, Needles and Ballon, it does not merely on that account warrant us in finding collusion or discrediting these parties. We have tried to weigh the evidence as if no relationship existed, and have carefully read it. If Yablonsky had advanced the money to complainant, there could be no doubt of his right to enforce the mortgage for all money advanced and ahead of any mechanic's liens irrespective of whether the money found its way into the property.

Blackmar vs. Sharpe, 23 R. I. 412.

In enforcement of construction mortgages, however, the burden rests upon the mortgagee to show the amount of money which has been advanced.

Dillon vs. Sentelle, 14 Ark. 430.

Foster vs. Otis, 2 Pin. Wis. 78.

Am. & Eng. Ency. of Law, 2nd ed. Vol. 20, p. 962.

Klein vs. McGuickian, 25 N. J. Eq. 433.

In this case the master correctly held

that the burden rested upon Yablonsky, or Needles who with notice took from him, to prove the amount of his actual advances for construction purposes. We believe the master was warranted in holding that in proving advances Needles and Ballon stood in Yablonsky's shoes, and that complainant is not concluded by their payments to Yablonsky. See p. 250; page 141, Q. 836. Needles' receipts show \$3100 (p. 168) and of this amount \$2313 was paid to Yablonsky (p. 180; p. 142, Q. 842), mostly claimed to have been for labor. (Cf. p. 145, Q. 872; p. 147, Q. 887). It was not sufficient for Needles to show that he paid \$2313 to Yablonsky in order that the latter might pay the laborers on the job. Yablonsky was not complainant's agent to receive money for this purpose. (See Exhibit A). He was bound by contract to erect a house. It was incumbent on Needles to show that the \$2313 he claimed to have paid Yablonsky went to or for the benefit of complainant's property. The difficulty with Needles' position is that the master did not believe he had shown this. The receipts are not conclusive. It is true the master erroneously states that Needles made certain admissions of a fraudulent arrangement with Yablonsky about the advances. We believe this statement was a mere error of transcribing as a reference to the testimony cited in connection therewith (p. 137-8, Lansing Lumber Co. vs. Wolk), shows it was Yablonsky's admission and not Needles'. The balance of the paragraph in which the master refers to this testimony seems also to indicate such an error. We therefore are not convinced that the master based his findings upon erroneous understandings of facts as respondent so strenuously urges. Yablonsky had no time books and knew nothing of those to whom he said he paid the money. He is a thoroughly discredited witness and

merely asserts that he made the payments. In view of the evidence of an expert that the labor cost in the construction did not exceed \$600, the master was warranted in refusing to accept Yablonsky's story of payment of \$2313, substantially all for labor; Yablonsky's receipts to Needles do not prove it.

To one reading the testimony of Yablonsky, Needles and Ballon there is a taint of insincerity. Needles and Ballon both testify to Yablonsky's untrustworthiness and the evidence clearly brands Yablonsky as unbelievable. The master saw and heard the witnesses and we can well believe that he took small stock in their truthfulness. Particularly is this true of Ballon's alleged advance to Needles of \$1000 as transferee of the second mortgage from Yablonsky. We do not believe the advance was ever made, and in taking this view we are not overruling Judge Tanner's original finding that the mortgage was not wrongfully procured. We simply find that it was procured by Yablonsky from complainant on the representation that more money was needed to complete the work. We believe the purpose was to give Yablonsky added profit on the job. (p. 138, Q. 803.) The stories told by Ballon, Needles and Yablonsky are divergent as to how this particular transaction came into being, and who made the arrangements therefor. The only thing upon which they agree and upon which a falsehood can be steadfastly clung to and remain beyond possibility of disproof is the story that Ballon turned over to Needles \$1000 in cash to be advanced by Needles to Yablonsky for the work. We do not believe that Ballon advanced any money to Yablonsky or Needles on the second mortgage, and even if he did, this was not payment to or for complainant. We sustain the master in finding that nothing is due on the second mortgage.

Reverting to the first mortgage held by Needles, the master accepted the testimony of the expert as to the value of the labor that went into the job. He added 10 per cent. profit for the builder Yablonsky. This seems to us fair and almost his only recourse in view of his disbelief in the veracity of Yablonsky, Needles and Ballon.

The testimony of Needles is that he did not know of the arrangements (Exhibit A), by which the Collins avenue property was accepted for \$1350 and that he only realized \$900. In view of the fact that it was ostensibly sold to Marks, who is related to both Needles and Yablonsky, for \$900 cash and the assumption of a first mortgage of \$850, and that the evidence shows indifference by Marks prior to making this purchase, and absolute ignorance as to the tax value of the property, we agree with the master in his belief that Needles was conversant with the facts and should be held to \$1350 as the amount to be credited complainant on this property. (See Needles' testimony, p. 348, Q. 683. Cf. Marks, p. 360, Q. 36; p. 362; see also p. 282, p. 283).

Two points in the master's report call for explanation which we cannot find. They are the credits of \$300 for brick and \$300 cash paid Yablonsky. The former item is evidently charged against Needles on the theory that the brick was given to Yablonsky as part payment on account of the contract price secured by the mortgage. We cannot agree with this. The use of the brick is referred to in the specifications. The specifications are made a part of the contract, Exhibit A, which we believe Needles knew about. But it seems to us that the reference in the specifications to the use of the brick as part of the consideration can fairly be held to mean that it was to be allowed by complainant in addition to the \$4500 complainant

agreed to pay Yablonsky. The \$4500 was fully covered by the \$1350 valuation of the Collins avenue property and the construction mortgage of \$3150. It seems to us probable that the brick would have been valued just as the equity in the Collins avenue property was done in the contract, if the brick was to be considered as part of the \$4500. We do not believe that the value of the brick should be charged against Needles or Yablonsky.

The item of \$300 cash paid to Yablonsky was after the mortgage had gone into Needles' hands to the knowledge of the complainant. Yablonsky had no authority to collect this money for Needles, and payment by the mortgagor to Yablonsky is not payment to Needles. Yablonsky was no more Needles' agent to receive payments than he was complainant's. These two credits, therefore, we disallow and the master's report is altered by increasing the amount due to Needles by \$600.

The master's findings are confirmed except the items of \$600 credited on Needles' account.

Counsel in the case: E. C. Stiness, Brennan & Connolly, W. A. Heathman, Lellan J. Tuck, Clarence N. Woolley, McGovern & Slattery, Thomas L. Carty and Michael F. Costello.

SUPERIOR COURT

Joseph G. Lagace

vs.

Balisle Brothers

} No. 48318

RESCRIPT

BLODGETT, J. Case tried in Woonsocket. After verdict of jury for the plaintiff for \$3278, heard upon motion of defendant for new trial.

The verdict was the result of a collision of two automobiles.

Plaintiff claims he was driving on right hand side of Social street in a Ford truck and first saw car of defendant, a

truck, about 20 feet away, standing at corner of Elm and Social streets, some seven feet from the corner; that he sounded his horn and proceeded on his way, and that truck of the defendant suddenly started and ran into his rear wheel.

The truck of defendant had the so-called right of way and the sole question arising as to liability is whether the driver used that right of way with due care.

The driver of defendant's truck claims he had just left a passenger upon his truck at the corner of Social and Elm streets, and was proceeding slowly across Social street by way of Elm street; that the plaintiff attempted to drive by in front of his car without any slackening of speed; that in doing so plaintiff was compelled to make a very short turn; that the car of defendant did not touch the car of the plaintiff; that owing to the short turn made by plaintiff, his (plaintiff's) car was overturned.

Chap. 1778, Public Laws, approved April 24, 1919, provides as follows:

"Every driver or operator of a carriage or other vehicle approaching the intersection of a street or public highway shall grant the right of way at such intersection to any carriage or vehicle approaching from his right; Provided, that traffic officers at such intersection may direct the traffic."

This statute has never been construed by the Supreme Court of this State.

In States having similar provisions it has been held that such a statute does not relieve the person who has such right of way from the use of due care for the rights of other users of the highway.

The case was submitted to the jury upon the question of fact as to whether the driver of defendant's car started to cross while plaintiff's car had partly crossed Elm street, and the driver could

have plainly seen defendant's car in such a position that to proceed would result in a collision. If the jury, as it evidently did, believed the story of the plaintiff, then the defendant's driver was not exercising due care.

There was much contradictory evidence. The driver of defendant's car did stop at the corner to let a passenger off, and did start up again. The court does not feel that any arithmetical calculation as to just how many seconds or fraction of seconds it would take the car of defendant to reach and strike plaintiff's car would assist in reaching a conclusion, since it is of the opinion that if the driver saw or could have seen by the use of due care that the car of the plaintiff had reached a point within the intersection of Social and Elm streets, or so near to such intersection that it would be unsafe for him to start his car, then it was his duty to permit the other car to pass by before starting his own car, and that he had no right under such circumstances to rely upon the right of way given him under the statute in question. The amount of the verdict, \$3278, evidently the amount arrived at by dividing some gross amount by 12, seems to the court excessive. The damage to the car was \$124.

The court is of the opinion that all of said sum of \$3278 in excess of \$2500 should be remitted, and that unless said remittance is accepted by the defendant within ten days, a new trial is granted.

For Plaintiff: J. R. Higgins.

For Defendant: Wilbur A. Scott.

SUPERIOR COURT

J. W. De Wolf

vs.

Pasquali De Prete

} No. 50501

RESCRIPT

BLODGETT, J. Heard upon motion for new trial after verdict for defendant.

Plaintiff drove an automobile westerly on West Friendship street, Providence, and at the junction of Elmwood avenue, swung to the south on Elmwood avenue. A car driven by the defendant on the right hand side of Elmwood avenue and going in a northerly direction collided with the car of plaintiff when the car of plaintiff was at a standstill.

The testimony disclosed that the plaintiff's car was stopped owing to traffic on the westerly side of Elmwood avenue, and that his car became stalled at or near the junction of Elmwood avenue and West Friendship street.

The street surface on the day of the accident, December 31, 1920, was icy and slippery. The car of the defendant was not provided with chains for the wheels.

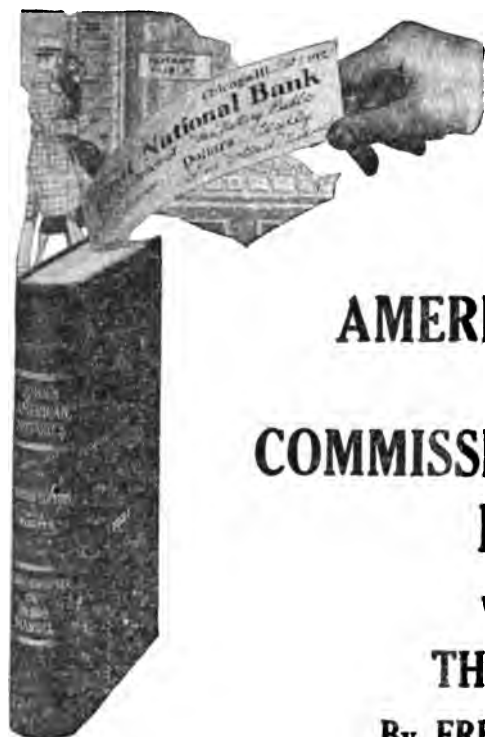
Plaintiff plainly had the right of way and defendant should have had his car under such control as to be able to stop the same at such a corner, whenever it was possible by the use of reasonable care to have seen and avoided plaintiff's car.

From the court's familiarity with this location, it is of the opinion that there was nothing to prevent the defendant from plainly seeing a short distance at least into West Friendship street, in approaching the same from the south and that such view could be had for some distance south of the junction. The court strongly feels that the preponderance of evidence is strongly in favor of the contention of the plaintiff that he was in the exercise of due and reasonable care under the circumstances, and that the defendant did not exercise due and reasonable care.

Motion for new trial granted.

For Plaintiff: A. G. Chaffee and George W. Bennett.

For Defendant: Murphy, Hagan & Geary.



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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 25

MARCH 24, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Supreme Court Calendar

MONDAY, MARCH 27, 1922

Ex5590 F & H	Elizabeth C. Grant vs James S. Grant	C M-B & L
Ex5602 T & C	Joseph Pennington vs John D. Glover	T L C
Ex5147 M H & G	J. D. McGuire vs Rhode Island Company	C W-A R W
Ex5615 C A K	P. J. Holmes vs V. J. Oddo	L & M

WEDNESDAY, MARCH 29, 1922

Ex5614 R L D	J. A. Tougas vs J. Lepontre	G M
Ex5574 A & A-J B	City of Prov., ben. P. Michaud vs V. Lawrence, et al.	J P M
Ex5575 A & A-J B	City of Prov., ben. M. Michaud vs V. Lawrence, et al.	J P M
Ex5569 G M & H	J. E. McMurtry, et al. vs River Spinning Co.	E & A

FRIDAY, MARCH 31, 1922

Ex5579 W & G	Jennie F. Congdon vs Louis H. Block	C & C
Ex5568 A G C	John M. Giblin vs Dudley Hardware Co.	G H & A

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MARCH 27, 1922

15317 Romano	M. F. Giaccia vs General Fire Ex. Co.	R T B
32552 Com & C	Shepard Co. vs Gen. Motor Trunk Co.	E & A
44781 F & H	I. Brayton vs Daniel A. Clarke	W L F
Eq5146 W & G	H. A. Samson, Exr. vs Jos. Paolino	Knauer-Coen
49693 F & H	Ella K. Stubbs vs. William J. Owler, et al.	B & B
46979 L S	K. Bazar vs William J. McCarthy	C S F
Kent F & H	Carrie E. Gilbert vs Constance R. Gilbert, et al.	
5752 J P B	Max S. Pearl vs Samuel A. Pearl	R & R

TUESDAY, MARCH 28, 1922

Eq5624 W & G	S. S. Krebs vs B. L. Fenner, et al.	Cooney & C
49162 G H & A	Marie Lalonde vs Leonide Lalonde	

WEDNESDAY, MARCH 29, 1922

Eq1866 S K & S	B. Dexter Aldrich vs S. H. Brownell	C C R
Eq5668 C R E	J. R. Alexander vs Lawrence F. Nolan, Adm.	
Eq5669 C R E	M. Boffi vs A. Albanese	
Pet.340 J F H	John F. Hanley vs New Haven Road	
Asst.174 G W B	In re assignment of J. Najarian	J R
50131 F & H	Wm. F. Wright, et al. vs U. S. Fire Ins. Co.	F Hebert
50132 F & H	Wm. F. Wright, et al. vs Ohio Farmers Ins. Co.	F Hebert
Eq5725 Coen	Alexander Cameron vs E. M. Warren	
Eq5760 West	C. Friedberg vs H. L. Raus, et al.	

Jury Trial Calendar

MONDAY, APRIL 3, 1922

42011 W H McS	Nancy Munyan vs William H. Cook	A B West
50409 C E S-F	Goodrich Oil Co. vs Antonio Zambrano	C & O'C
51136 B & B	Blumenthal Wool Stock Co. vs Rosella Mills, Inc.	

50141 Com & C
47656 W H McS
48517 E C S
50210 C & C

Baird-North Co. vs Am. Railway Express Co.
Francis R. McKenna, Adm. vs Charles E. Benoit
Redbord Gabrilove & Co. vs Crown Clothing Co.
Carmine D'Errico vs Emogene Ewald

G H & A
A & A
Wildes
C A Walsh

TUESDAY, APRIL 4, 1922

37736 G E & C
49828 J B-A & A
51257 Ziegler-K
50391 P & DeP
50400 Jackvony-R
51443 G M & H
52320 C A W
50475 F F Farrell
50967 Costello
51232 R & R
50443 L B & McC
50171 H E & M
48633 F & H
52089 G & C
52308 West-H
51499 M & M
49044 C & C
48853 W & W

John B. Nash vs Edward M. Fay
A. J. Lendry vs Arvilla Bowen, Ap.
Herbert Baker vs Antonio J. Bruno
Maria Vialton vs Guiseppina Robbio
Guiseppina Robb'o vs Maria Vialton
E. C. Church Co. vs John R. Armstrong
Anna Von Gollschalk vs Lawrence Baroni
Myles Ives vs N. E. Butt Company
Mutual Trading Co. vs K. M. Harris
Celia A. Thayer vs John W. Keyes, et al.
Harriet E. Dunbar vs Obadiah B. White
Donald Mackay vs Dimond Company
Louise Redelspenger vs Zenas W. Bliss, et als.
Frank J. Lee vs Fuller Building Company
Bertha Seltzer vs Gulf Refining Company
Benjamin H. Burdon vs Herman Unrath
Mary Mediros vs Roland Arter
Thomas F. Randall vs Antonio Fallace

F & H
Q & K
E M & J J S
J Romano
P & DeP
Q & K
P & DeP
R T B
Carty
F & H
S & L
P C J-M
Sweeney
S K & S
T & L
S S L
W & G
M A S

THURSDAY, APRIL 6, 1922

46983 F H W-O
49694 R W R
51216 E R Walsh
50480 A B West
MP476 WAS-CLC
52033 Quinn
45081 P & DeP
45856 T P C

Mohamed Alli vs Clarence A. Cotton
Samuel T. Gardner, Ex. vs Ezekiel E. Gardner
John Keyes vs Charles Pay
Abraham Bazan vs Samuel Waldman
Clara B. Berkander vs City of Providence
Frank Stead Cust vs Ethel I. Warner
Rosina Cortelessa p. a. vs Salvatore Simonetti
John D. Vires, et al. vs Archille Zovaliangos

R T B
W & G
G A B
W C & C
O L H
W & W
J E D

FRIDAY, APRIL 7, 1922

48262 R & H
48924 F & H
48925 F & H
49810 P & DeP
51862 McG & S
50435 J V-B
48355 J A E-B
48307 G R M
50174 Stin.-M-B

Samuel O. Sparks vs Aetna Cas. & Sur. Co., H'tford
Amy L. Maher vs R. I. Co., F. H. Swan et al., Rec.
Thomas F. Majer vs R. I. Co., F. H. Swan et al., Rec.
Thomas Uci ferro vs Raffaele Lafazio
Samuel Whitfield vs The L. & R. Company
Antonio Paolantonio vs Allie Zura
Manuel Marshall, p. a. vs Eden H. Bigney
Ernest Allen vs Howard Angell
Ansonia Forest Products vs Lyon Harootunian

G H & A
W-S
W-S
C-J
S-M-B
McG & S
J H-L
E D H
J R

District Court Appeals Calendar

MONDAY, APRIL 3, 1922

50524 P & DeP
49261 J G LeC
51347 J T C
50296 T M O'R
49841 C S S
48463 L B & McC
41336 J H Coen
51724 Stiness
51780 McMahon
51781 F-J M
49500 S K & S

Nicola Quartucci vs Peter Hicks
Myer R. Armstrong, Ap. vs Adolphus Rottenberg
John Dempsey vs Charles Crankshaw
Imperial Confectionery Co. vs Frank Regine
Met. Wholesale Grocery Co. vs Leon Brutner
Jacob Eden, Ap. vs Frank H. Swan et al., Rec.
Malut Mahamed vs Charles H. Pasl'alian, Ap.
Columbia Graphophone Co., Ap. vs D. H. Slavitt
Andrew Burek vs Teresa Bracik, Ap.
Teresa Bracik vs Andrew Burek
Stenman Elec. Valve Grinder Co. vs Millers, Inc.

C A W
R & R
G F T
J V
P V M
W-C
C & O'C
B & B
J J M, Jr.
McMahon
F H W

47889 Stiness	J. Samuels & Bro., Inc., Ap. vs Norah Border	J A Lee
50844 Stiness	Geo. L. Claflin Co. vs Vincent De Russo, Ap.	P & DeP
48470 Boudreau	Mary Harty vs Arthur E. Anderson, alias Ap.	R & H
52296 P & DeP	Guiseppa Simcone vs Marietta Valente, Ap.	W W O
50100 J Veneziale	Antonio Capio vs Antonio Marola et ux., Ap.	B C
52768 E C S-M-B	Proctor & Gamble D. Co., Ap. vs DiSandro & Dicco	Pro se ipso
50198 W & G	James H. Parkinson vs John B. Iaucci, Ap.	P & DeP
51561 Brand	Nat'l. Wholesale Gro. Co. vs Antonio Petrella, Ap.	

TUESDAY, APRIL 4, 1922

51112 Bowen	Globe Loan Co. vs Robert S. Grant et al., Ap.	R & R
49728 W & W	W. J. Connell Co. vs Millers, Inc., Ap.	F H W
48456 R & R	Isaac Weinbaum, Ap. vs Fred Archer alias	Slocum
49900 Stiness-M	Victoria Shoe Co. vs Sample Shoe Co.	B & B
50194 E A	Harriet D. Ramdell vs John F. McGair, Ap.	J E B
51725 Stiness	Amer. Products Ex., Ap. vs Vinenzio Vicario	P & DeP
46170 Stiness	James G. Lyons vs E. P. Gearin & Co., Ap.	C & C
52216 A B West	Samuel Abidon et al. vs George Fenari, Ap.	J T W
50570 C R E	Antonio Marcaccio, Admr. vs Vito A. Marcaccio, Ap.	Jackvony
52173 F & H	Everett J. Enos vs Ruth Whitmarsh et al.	K H & F
50029 M & T	American Nat. Co. vs People Furniture Co., Ap.	J F C
45916 A H O B	Giovanni Rambone vs E. Natale, Ap.	J P Brennan
48277 A H O B	Domenico Laurienzo vs Harrington & Son, Ap.	C R A
52294 P & DeP	Camillo Mancini, Ap. vs Florindo Rossi	P C Joslin
31132 C Z A	Arthur B. Harrington, Ap. vs D. Larvienzio	J L M
50098 J H Coen	Hugh McGuckian vs Walter Wood, alias Ap.	W O
50833 J H Coen	Hugh McGuckian vs Horace J. Minckler	T J D
45893 P & DeP	John Miller vs Ann Hanley, Ap.	J L C
52432 McG & S	Andrew Kosinski vs Joseph Budwasozyk, Ap.	Pro se ipso
51857 W & W	Smith Bros. vs Horace G. Knowles, Ap.	D P M
52576 C S S	Met. Wholesale Gra. Co., Inc. vs J. Bargnie, Ap.	J T B
50105 C R E	Daniel Kitchen vs John Broadman, Ap.	McG & S
50368 C R E	Daniel Kitchen vs John Broadman, Ap.	McG & S
50922 C R E	Daniel Kitchen vs John Broadman, Ap.	McG & S
52905 P & DeP	Blanche L. Jacobs vs Ferdinand I. Koch, Ap.	J Coen

WEDNESDAY, APRIL 5, 1922

51106 Slocum	Fed. Truck Sales Co. of R. I. vs Frank Watson, Ap.	Cotton
51118 Barnefield	Bernard Goldstein vs Andrew Dziok alias	Cassidy
48165 J H Coen	Louis Cardinelli vs Anthony Stephens, Ap.	J H A G
51507 J L Casey	James D. King vs John A. Lynch alias Ap.	R J McM
51676 Q & McK	Albert S. King vs Frank Taylor, Ap.	J A Lee
50366 T M O'R	Sylvia Perrault vs Dosethe Tetreault, Ap.	A & A
50033 Stiness-M-B	Empire Truck Co. vs Olneyville Fur. Co., Ap.	F L H
36630 B C	Domenico Martino, Ap. vs Vincenzo Zanni	J F C
51798 McSoley	Joyce Bros. & Cq. vs Michael Ledo, Ap.	H W K
51844 E C S	Stevens Bros., Ap. vs S. Tourtellot & Co.	McG & S
51665 G F Troy	Francesco Tedesco vs Edward A. Tramonti, Ap.	A L C
52104 B & B	Francesco Barbarita vs John V. Coppe, Ap.	P & DeP
51569 Ziegler	Sanderson Bros. vs William A. Tyron Co., Ap.	J W Grimes
43672 M F C	Samuel Needle vs H. L. Slefkin, Ap.	G Helford
49257 P & DeP	Angelo D. Pasquale vs John Aiello, Ap.	N Hilfer
50313 Stiness-M-B	Bass and Vudovitz vs Julius Koslanowitz	E F McE
51973 J Veneziale	John Di Orio, Ap. vs Herman Rosen et al.	R & R
47523 E D Higgins	Edward M. Horton vs T. E. Bennett, Ap.	M H & G
52637 E H Ziegler	C. Mantion Chace vs Leonard W. Horton, Ap.	F P D
51713 J B Lawlor	Armstrong Tob. Co. vs Green Lantern Tea Room	McG & S
52716 J A Hammill	Louis Benjamin vs Thomas B. Larcy, Ap.	J F L

THURSDAY, APRIL 6, 1922

51108 Slocum	Auto Met. Pts. & Sup. Co. vs Pasquale Macchio	Stefano
48970 R G E Hicks	Arsene B. DesRoches vs Todd Mellor Co.	R & R
51667 R & H	Felix De Grange vs Earl G. Page, Ap.	C C & McC
50688 J J Mee	Beni Perrotto vs R. I. Society P. C. Co., Ap.	L & McD
51728 C N Wooley	Riley Duckworth vs Clifford H. Gooding, Ap.	Pro se ipso
51793 Fischer, Jr.	Russell F. Gilmartin et al., Ap. vs Paul C. Koehler	C & C

51845 E C S	Jos. Garneau Co., Inc. vs John Marzullo & Co.	P & DeP
50968 Stiness-M	La Salle Ext. Univ., Ap. vs Charles Shackelton	McK & B
52045 S S L	James Tramonti vs Edward White, Ap.	T F D
49231 B & B H	Carl A. Anderson, Ap. vs A. J. McDonald	J C C—B
50096 J L J-B., Jr.	Ellis Hanna, Ap. vs Edward Allard	L Pouliot, Jr.
49825 A H O B	Louis Altien & Son vs Thomas Singleton, Ap.	T L Hanley
52439 P & DeP	Vincent J. Oddo vs Peter Hoyas, Ap.	McG & S
52039 J E B	Charles Kayatta, Ap. vs Irving K. White et al.	L F Nolan
52109 R & R	Globe Printing Stationery Co. vs A. P. Fishman, Ap.	J S
52624 P & DeP	Antonelli Upholstering Co., Ap. vs Prov. Cab. Wks.	McG & S
52773 C S Slocum	Arc Vulcanizing Co, Ap. vs M. Cohen	J C S

FRIDAY, APRIL 7, 1922

51290 Slocum	Beady Radiator Wks., Ap. vs Northway M. S. Co.	L K & S
49503 J H Coen	Westcott, Slade & Balcom vs Albert S. Matt, Ap.	J P B
51326 C S S	Stephen S. Arnold vs Raffaele Isabella, Ap.	W M P B
48890 E H Z	Otta K. Paquin, Ap. vs Rhode Island Co.	Kiernan
50317 E C S-M	Prov. Paper Co., Ap. vs M. Lubrano	G E & C
48861 AS&APJ	D. Auerback & Sons vs Horvitz Bros., Ap.	R & R
49086 P & DeP	Antonio Zeland, Ap. vs David Shore	Heathman
49101 Boudreau	Godfrey M. Hyams et al., Ap. vs Amer. Hand L'dry	R & R
52503 E P B A	Ernest P. B. Atwood, Ap. vs Ray Howard T. T.	J E D
49089 P & DeP	The N. E. Grocery Co. vs B. Mansuette, Ap.	C R E
50913 C & C	Frederick Gorton et al. vs Pasco Jannetto, Ap.	J C C
52638 C A Kelley	James Deene vs Anthony Stephens	J H A G
48308 G R McLeod	Mildred Allen, Ap. vs Howard Angell	E D H
50903 E H Z-K	Atlantic Tubing Co. vs Rhode Island Company	Sweeney
51598 P Romano	Vincenzo Vicario vs Amedeo Narducci, Ap.	J V

SUPREME COURT

William G. English }
 vs. } Ex. &c. No. 5540
 Thomas F. Keeher }

(Before Barrows, J., Below)

RESCRIPT

This is an action of assumpsit brought by William G. English against Thomas F. Keeher to recover an amount alleged to be due under an oral contract entered into in the year 1918 and again in the year 1919.

The case was tried in the Superior Court at Newport before a justice of that court sitting with a jury. A verdict was rendered for the plaintiff in the sum of \$2000 and interest. The defendant's motion for a new trial was denied by the trial court. The case is now before us upon the exceptions of the defendant.

The exceptions, now relied upon, are to the refusal of the trial court to di-

rect a verdict; to the denial of a request to charge, and to the denial of the defendant's motion for a new trial.

The plaintiff and two brothers-in-law of the defendant, by the name of Duff, were in the employ of the defendant in the year 1917.

The plaintiff claims that on January 2, 1918, the defendant invited him and the Duffs to a conference and proposed that the four of them should carry on business together as carpenters and builders during the year 1918, each to receive a weekly wage with an equal division of profits at the end of the year; that if, at the end of that period, the plaintiff and the Duffs, or any combination of them, desired to buy the business at a valuation of \$7500, the profits to which the purchaser or purchasers might be entitled could be applied toward the purchase price; and further that if any one or all of them were satisfied at the end of the year that they could not agree, he or they might leave,

each one on retiring to take his proportionate part of the profits for the year then expired. This arrangement, according to the plaintiff, was entered into with the consent by the agreement of all the parties.

The defendant admits that there was a meeting on January 2, 1918; that a contract was entered into somewhat in the form as claimed by the plaintiff, but that it was not for the entire year of 1918, but only for six months, then to be terminated by the defendant if, in his opinion, the men were not working together in harmony; and that the provision regarding the disposition of profits was confined to their application to the purchase price in the event that the plaintiff and the Duffs together or singly should decide to take over the business at the price of \$7500.

The defendant claims that at the end of six months there was lack of harmony sufficient to frustrate the successful conduct of the business and to justify him in exercising his right to terminate the contract and that he accordingly did so with the consent and approval of all the other parties.

The plaintiff denies that there was any termination of the contract at the end of six months and says that the parties continued to work along under it for the entire year; and that at the expiration thereof he informed the defendant that he could not get along with the Duffs, whereupon the defendant agreed to eliminate them.

In January, 1919, the plaintiff and the defendant conferred regarding the continuation of the business at which time the plaintiff says that he was informed by the defendant that the net profits for 1918 were \$6500, of which the plaintiff's share was \$1625, this being satisfactory to the plaintiff, he and the defendant agreed to continue together, the plaintiff to receive a weekly wage and one-

fourth of the profits for the year 1919, and at the end thereof the plaintiff could purchase the business if he so desired for the sum of \$7500. It was also agreed that the plaintiff's shares of the profits should be kept by the defendant as a part payment together with the plaintiff's share of the profits of the business in 1918. The plaintiff says that it was agreed between him and defendant that in case there was no purchase the defendant would pay the plaintiff one-fourth share of the profits for 1918 together with one-fourth of the profits of the year 1919.

The defendant, on the other hand, absolutely denies that there was any agreement entered into regarding the year 1919. He admits a meeting with the plaintiff and three or four other employees, but says that such meeting related to an offer of the defendant to give the men a bonus at the end of the year 1919 if the business should be found to warrant it.

The plaintiff admits that there was a conference regarding a bonus, but that the offer did not apply to him and that no bonus has ever been paid to him though the other men received one.

The plaintiff, as he claims, worked for the defendant throughout the year 1919 as superintendent. At the close of the year 1919 the plaintiff says that he informed the defendant of his desire to purchase the business, at which time some discussion arose as to profits; that the defendant informed him that the profits for 1919 were about \$14,000, and that the plaintiff's share was \$3500, and that the plaintiff replied that this amount added to his share of the profits for 1918, amounting to \$1600, equalled \$5100, leaving a balance of \$2400 to be raised to meet the purchase price of \$7500.

A dispute then arose as to whether the profits for 1918 had been wiped out

by some unexpected outstanding bills.

At a later conference between these parties the defendant offered the plaintiff a bill of sale of the property if the plaintiff would give him a mortgage back. This offer was refused by the plaintiff, who in turn tendered the defendant \$2400. This tender was refused by the defendant. The plaintiff then demanded \$5100 as his share of the profits for the years 1918 and 1919, which demand the defendant refused and thereupon the plaintiff brought his suit to recover that amount.

The defendant denies telling the plaintiff that the profits for 1919 were \$14,000.

The various conflicting claims of these parties are sufficiently apparent without resorting to citations from the transcript of testimony.

At the trial in the Superior Court, witnesses for the respective parties were examined at great length, including professional accountants who had examined the books of the defendant and who presented voluminous statements as to the financial affairs of the concern and extended explanations as to what these statements showed regarding the business transacted and the profits therefrom in the years 1918 and 1919. From all this mass of contradictory and conflicting evidence it devolved upon the jury to ascertain and declare the rights of the parties.

The jury found a verdict for the plaintiff in the sum of \$2000, with interest of \$126.32, making a total of \$2126.32. The verdict has been approved by the trial court, the trial justice saying in his rescript that the "amount of damages is smaller than we should have awarded the plaintiff upon the figures presented."

The questions which were submitted to the jury were questions of fact and we cannot say that the conclusion reached was, upon evidence, unwarranted or un-

reasonable. We think that the jury exhibited much sagacity in extracting such a rational verdict from a conflict of testimony so bewildering.

We find no merit in any of the defendant's exceptions and they are accordingly overruled. The case is remitted to the Superior Court with direction to enter judgment for the plaintiff on the verdict.

For Plaintiff: Moore & Curry.

For Defendant: Max Levy.

SUPREME COURT

James H. Brown

vs.

The Soldiers' Bonus Board

} M.P.No. 374

OPINION

STEARNS, J. The proceeding is by writ of certiorari. Petitioner claims that he is entitled to receive a soldier's bonus under the provisions of Pub. Laws 1920, Chap. 1832. His claim was denied by the Soldiers' Bonus Board and petitioner alleges that this action of the board was erroneous. The facts are not in dispute and are substantially as follows:

In February, 1917, the Governor of the State, acting on the request of the United States Government, communicated to him by the Commanding General, Eastern Department, Governors Island, N. Y., ordered protection to be furnished by the National Guard over certain railroad bridges in this State. On April 2, 1917, the Governor (Special Orders, No. 66,) issued an order, a part of which is as follows: "IV. Complying with telegraphic instructions from Headquarters, Eastern Department this date, the 2d, 5th, 12th and 15th Companies organized as a battalion, will assemble at their respective stations today for initial muster into United States service under command of Major Johnson, R. I. Coast Artillery, N. G., to assist in guarding pub-

lic utilities." In response to this order petitioner, who was a member of the National Guard, reported for duty and was stationed at the State Armory. His duty required him to visit the several detachments of the battalion which were on guard at reservoirs and certain bridges and to supply them with rations. On the 6th of April war was declared with Germany. On that day petitioner was mustered into the Federal service by signing a Muster Roll, which was also signed by Colonel Blake, a regular army officer and the National Guard instructor of this State, and also by a National Guard officer. May 11, 1917, petitioner was honorably discharged, "By reason of having dependents, in accordance with Bulletin 36, 1917, Eastern Department." This discharge is made out in the usual form of the State of Rhode Island National Guard discharge, on the regular blank provided by the State for such purposes and is executed by Major Johnson, commanding Provisional Battalion, R. I. Coast Artillery. Subsequently, at the request of the petitioner, this discharge paper was sent to the War Department in Washington. The Adjutant General of the U. S. Army added thereto the following statement:

"War Department

Oct. 14. 1921.

The Adjutant General's Office.

The records of this office show that James H. Brown, Sergeant, Q. M. Corps, attached to Provisional Battalion, Coast Artillery, National Guard, State of Rhode Island, enlisted June 14, 1916, reported for Federal Service, April 2, 1917, under the call of the President, and was honorably discharged from the Federal Service, May 11, 1917.

J. ERWIN,

Adjutant General."

Petitioner has received a bonus from the Federal Government under the Federal Law (Fed. Stat. Ann. 1919, Supp., Sec. 1406). This fact however has no particular relation to the question before us. (*Bannister vs Soldiers' Bonus Board*, 43 R. I.), which is to be decided by reference to the provisions of the State act, Chap. 1832.

Section 1, Chapter 1832, is as follows: "In recognition of the patriotic services of residents of the State, who served in the army and navy of the United States during the war with Germany, provision is hereby made for the payment of a soldiers' bonus and for the creation of a board to be known as the Soldiers' Bonus Board, with full and final authority to determine what residents of the State are entitled to payments under the provisions of this act."

Section 2 provides for the payment of the bonus to each commissioned officer and enlisted man, "duly recognized as such by the War or Navy Department, who was mustered into the Federal service and reported for active duty on or after April 6, 1917, and prior to November 11, 1918, * * * * " and, provided further, that no benefits shall accrue under this act because of the service of any person appointed to or inducted into the military or naval forces who had not reported for duty on or prior to November 11, 1918, at the military cantonment or the naval station to which he was ordered."

Chapter 1832 became a law January 9, 1920, more than a year after the armistice and the cessation of hostilities. At that time the facts in regard to the various classes of military service which had been rendered to the Federal Government were well known to the Legislature which was then legislating in regard to what had been done in the past. Not every person who had

performed military service for the Federal Government within the prescribed period was entitled to receive a bonus. Sections 2 and 4 limit the class in certain specified respects. Although the Bonus Board does not now urge its right to determine the question with full and final authority as provided in Sec. 1, yet the attempt by the Legislature to confer such power on the board seems fairly to indicate an intention on the part of the Legislature to restrict the payment of a bonus to such persons as clearly come within the terms of the act. The bonus is a gift by the State to certain beneficiaries who are designated by the act. The scope of the act is defined and restricted by Section 1 to residents of the State who served in the army and navy of the United States during the war with Germany. What constituted that army? The Selective Service Act, or as it is often called the Draft Act, was approved May 18, 1917. Speaking of this act the Secretary of War in his report to the President (War Department Annual Reports, 1917, p. 12), says: "The Act of May 18, entitled 'An act to authorize the President to increase temporarily the Military Establishment of the U. S.,' looked to three sources for the army which it created: 1. The regular army. 2. The National Guard. 3. A national army raised by the draft to be summoned by the President at such time as he should determine wise."

July 3, 1917, the President, by proclamation, called into the Federal service and drafted the National Guard of the several States. Later the National Army was assembled under the Selective Service Act. The army of the United States for the war with Germany was thus created and established by act of Congress to accomplish a particular purpose, by a new organization and, as

stated by the Secretary of War, the act created but one army, selected by three processes. Petitioner belonged to neither branch of this army, which had not come into existence at the time he performed the military service. Hostilities on land did not begin until many months after the time of the creation of the new army. Having dependents, in pursuance of the policy of the government with reference to the National Guard and the National Army, petitioner was not called upon for service in the new army. As a member of the National Guard he performed military service within the limits of the State in the nature of police duty, first by order of the State and later by order of the President. Assuming that petitioner was in the Federal military service after April 6th, he was thus engaged as a member of the National Guard. In his discharge it is expressly stated that he is "honorably discharged from the National Guard of the United States and the State of Rhode Island." As a member of the National Guard he was subject to perform military duty for the State and also in certain emergencies for the Federal Government. The Federal service he performed was not included in the provisions of the Bonus Act. We find that petitioner's claim was properly disallowed.

The writ of certiorari is dismissed.

For Petitioner: E. H. Ziegler and C. A. Kelley.

For Respondent: Attorney General H. A. Rice.

SUPREME COURT

A. H. Dondero

vs.

Standard Emblem Company

} No. 49336

RESCRIPT

BLODGETT, J. Heard upon motion

for new trial after verdict for plaintiff for \$1700.

Action by a salesman to recover commissions, claimed to be due on sales in accordance with a contract between plaintiff and defendant.

One of the issues before the jury was as to whether plaintiff had terminated the contract upon a certain date, and upon this issue there was much testimony of a conflicting nature and the jury had testimony upon which a verdict could be based.

The amount of the verdict is clearly excessive under the testimony. New trial granted unless plaintiff, within ten days, accepts a remittitur of \$402.09 from the award of \$1700, making the amount of the verdict, \$1297.91.

For Plaintiff: Green, Hinckley & Allen.

For Defendant: Fitzgerald & Higgins.

SUPERIOR COURT

Contrexville Mfg. Co.

vs.

Oswegatchie Textile Co.

} Eq. No. 5113

RESCRIPT

March 16, 1922

BARROWS, J. Heard on (1) the Oswegatchie Textile Company's receiver's exception to that portion of the master's report granting to W. H. Duval Company an equitable lien on merchandise and funds now in the hands of the receiver to cover Duval's claim amounting to \$54,978.66; (2) Duval's exceptions to that portion of the master's report disallowing interest on the above claim and attorney's fees in attempting to collect it.

Duval was engaged in financing manufacturing concerns. The facts are with one exception undisputed. They fully ap-

pear in the master's report. The disputed question relates to the solvency of Oswegatchie.

In our opinion its solvency is immaterial. There is no question of fraud involved and the receiver stands in no better position than Oswegatchie.

Ryder vs. Ryder, 19 R. I. 188.

Frank vs. Broadway Tire Exchange Co., 42 R. I. 27.

In Rhode Island an equitable lien may be sustained which need not be recorded or in any way made public.

Gorton Mfg. Co. vs. Gardiner, 11 R. I. 626.

Dellinger vs. Waite, Thresher Co., 228 Fed. 506.

Hence, cases outside the State denying equitable liens because they are secret and allow other creditors of the lienee to be misled by appearances are not here tenable. (It may be noted in passing that in the present case Duval's connection with the business appeared on the sign outside the door of the Oswegatchie plant).

The test of validity in Rhode Island is not whether a lien is secret or known. A secret lien is good against a volunteer, such as a receiver. There is no reason in Rhode Island for disallowing an equitable lien honestly created, even though it takes away assets which otherwise might go to unsecured creditors. We are in the habit of recognizing vendor's liens on real estate, conditional sales with clingfast leases of personal property, landlords' liens for rent, and so forth.

The vital question in the present case is whether an equitable lien was intended to be created. It is agreed that such lien depends on the maxim: "Equity regards as done that which ought to be done." Respondent urges that the parties did everything which they intended and that their doings legally fall short of creating a lien; that as a result there-

of equity cannot come to Duval's aid.

Hunt vs. Rousmaniere's Adm'r., 1 Peters, U. S. 1, is relied upon. There the court refused in a bill for reformation, based on a mistake arising from a misconception of law as to the effect of a power of attorney as security to aid Hunt, who had deliberately chosen a power of attorney in preference to a bill of sale or mortgage as the specific form of his security. The court said that it could not decree another security "not only different from that which had been agreed upon but one which had been deliberately considered and rejected by the party now asking relief." Respondent urges that the contract here drawn was as in the Rousmaniere case, evidently drawn by counsel, and though it fails to give Duval the security sought, yet for this court to do so would be to make a new contract, which equity is not authorized to do. The whole question, therefore, turns on the meaning of the agreement between Oswegatchie and Duval (Exhibit 1).

A careful examination of this agreement can not leave any doubt that both sides intended to give Duval a hold on Oswegatchie's business and assets of such a nature that all of Oswegatchie's property should be bound for Duval's advances.

Section 3, relating to pledging stock control or cash is not the only section relating to security. That section is merely one type of protection. It is referred to as a guarantee fund in other portions of the agreement, namely, the opening paragraph and in Section 17.

Section 2 requires Oswegatchie to do all its business through Duval. Its bills went out stamped, "This account is owned by and payable only to Duval." (Exhibit II).

Section 6 requires merchandise to be consigned to Duval and if payment is made for manufactured goods to Oswegatchie the funds are held in trust for Duval.

Section 11 relates to purchases. Duval is to furnish the money and approve of the purchases. The section then provides two ways of protecting Duval; first, by invoicing direct to Duval when he pays the seller; or, second, if Duval allows Oswegatchie to pay the seller directly and receive the goods; it requires Oswegatchie to at once consign the goods to Duval in a manner approved by Duval. This evidently was to save one extra handling. The manner approved was that Oswegatchie stamped upon its invoices as soon as received the words, "For value received we herewith consign the merchandise evidenced by this invoice to W. H. Duval Company, 225 Fourth avenue, New York city." This invoice was at once sent to Duval.

Section 9 gave Duval control of all credits proposed to be given by Oswegatchie. It included the veto power on these credits.

Section 15 provides for limitation of advances on merchandise, raw and in process, based upon 75 per cent. of the cost.

The course of business shows that every invoice of the many coming to

Oswegatchie was at once sent to Duval with the statement before quoted. Shipment to Oswegatchie directly with an immediate consignment by Oswegatchie, to us shows that Oswegatchie meant to hold the goods as security for Duval. The word "consigned" usually means the shipment to a factor or agent with the retention of title in the consignor.

Cyclopedic Law Dictionary: Words Phrases.

It may, however, be used in a different sense where the title is in the consignee.

Schenck vs. Saunders, 13 Grey 37 (1859).

It is evidently a term to be interpreted in the connection in which it may be found. It seems to us that the words "consigned to," as used in the present instance, fairly mean "hold for."

It would not be claimed, where the goods were shipped to Duval and by Duval consigned to Oswegatchie, that the lien should not exist. We see no good reason why the avoidance of a reshipment should affect the result in view of what we believe was the plain intention of the parties.

From the receiver's admission relative to the amount of goods from such invoices that came into his possession, we are compelled to hold that an equitable lien exists in favor of Duval for the full amount as found by the master. In view of Section 15 of the agreement, we cannot see that it is important to see whether some of Duval's advances went for labor.

The master has carefully discussed the law of equitable liens and the cases cited by receiver. We shall not duplicate the discussion. We have examined the cases and agree with the master's views. Hunt vs. Rousmaniere is not controlling because mere stamping on the invoice was very plainly not a completion of all that the parties contemplated nor the selection of the specific form the security was to take. This is shown by an ineffectual attempt to make McCabe, Duval's agent. Moreover, Hunt vs. Rousmaniere was a case where reformation was sought. It was not a case of equitable liens. The principle underlying the present case is found in Sprague vs. Cochrane, 144 N. Y. 104.

"Where the intention is to give a lien and what is done to that end is too defective to create it but is consistent with its creation and not a contract for something else, equity will treat as done that which ought to have been done."

See also, Matter of Imperial Trading Co., 39 A. B. R., 524 Dist. Ct., N. Y. (1917).

In the present case the stamping of the invoices to our minds indicates an intention on the part of Oswegatchie to hold the property shown on said invoices, or its proceeds, as security for the obligation from Oswegatchie to Duval

The exceptions of the receiver to the report are therefore overruled on the question of equitable liens. No other exceptions were pressed at the hearing. The receiver's exceptions are therefore all overruled.

Finding an equitable lien in favor of Duval, we see no reason why Duval is not entitled to interest. The case seems to us analogous to cases of mortgages where, in spite of bankruptcy and the law's delay, a mortgagee is entitled to his interest up to the date of payment.

We therefore allow interest as claimed. The amount figured by counsel is \$4179 to March 8, 1922.

We sustain the exception of Duval to the master's refusal to allow interest.

We find no warrant for granting counsel fees under the agreement to reimburse Duval for expenses connected with the business or losses connected with the sale and delivery of merchandise. This exception to the master's report is overruled.

Decree may be entered accordingly.

For Plaintiff: Curtis, Matteson, Boss & Letts.

For Defendants: Huddy, Emerson & Moulton and E. C. Stiness.

SUPERIOR COURT

Frank Morrell
vs.
Alphonsine J. Lalonde, et al. } No. 47364

RESCRIPT

SUMNER, J. Defendants have filed a petition for a new trial on the usual grounds, but at the hearing urged only the ground that the damages awarded by the jury are excessive.

The plaintiff has brought suit for loss of services, past and prospective, of his

wife, and for expenses he was obliged to incur in running the house, in caring for her, and in the payment of money for medical and surgical treatment, all due to the neglect of, and the careless and unskilled treatment of his wife, by the defendant, Lalonde, whom he had employed as a physician and surgeon.

The main facts shown by the testimony are referred to more fully in the rescript in the case of Mary L. Morrell vs. Alphonsine J. Lalonde, et al., No. 47365, to which reference is hereby made, the two cases being tried together.

The jury awarded the plaintiff the sum of \$2333.

It is not exactly clear how soon after the return from the hospital the plaintiff's wife was able to again substantially perform her wifely duties. The plaintiff claimed that it was almost a year before his wife could do any work at all. On the other hand, he testified that after she came back he had some one in the house for five or six weeks only. It is perhaps fair to assume that within two or three months after Dr. Harris ceased to pay his visits, which was on October 19, that she was able to take up her former duties. Before her operation she testified that she was getting \$15 a week for her services and at times got \$10 a week besides for dress-making, but how much of her earnings, if any, were turned over to her husband is not shown, or what arrangements, if any, there were between them as to how the money received for her services outside of the family should be divided. She has so far recovered now that she is

able to perform the ordinary housework and cooking for a family of three and look after eleven rooms, though she still complains of occasional weakness from her swollen leg and some pain in the wound made by Dr. Lalonde. As an operation was necessary any way, of course, part of the loss of time when she was prevented from performing her domestic duties and part of the subsequent weakness could not be ascribed to the acts of the defendant.

The plaintiff's wife is now 61 years old with a life expectancy of 13.82 years.

The plaintiff shows an outlay on account of his wife's illness and her subsequent incapacity of some \$300. This includes the cost of a necessary operation and the time that she would have been obliged to be away from him regardless of Dr. Lalonde's acts. She is now earning \$8 a week and her meals. As to whether there will be any future loss of earnings due to Dr. Lalonde's acts there is no positive testimony. Dr. Kingman thinks that the two operations will "leave a permanent trace behind."

The court feels that \$1500 would be ample compensation to the plaintiff and accordingly grants the petition of the defendant for a new trial unless the plaintiff shall, in writing, within ten days of the filing of this rescript, remit all the verdict in excess of \$1500.

For Plaintiff Henry C. Hart of Curran & Hart and Charles Kiernan.

For Defendant: Huddy, Emerson & Moulton.

SUPERIOR COURT

Mary L. Morrell

vs.

Alphonsine J. Lalonde, et al.

No. 47365

RESCRIPT

SUMNER, J. Defendants have filed a petition for a new trial on several grounds, but at the hearing confined their arguments to the claim that the damages awarded by the jury were "grossly excessive."

Plaintiff has brought suit alleging that while she was suffering from strangulated hernia she employed the defendant, Dr. Lalonde, as a physician to treat her, and, after accepting such employment, he grossly neglected her and when he did operate, the operation was so unskillfully and negligently done that it afforded her no relief, and, on the other hand, added greatly to her pain and suffering. The United State Fidelity and Guaranty company is joined as a party defendant under the statute by reason of its issuance of a policy of liability insurance to said Lalonde. The jury brought in a verdict for the plaintiff for \$13,416.

The facts as established by the testimony are as follows:

That the plaintiff consulted with the defendant, Dr. Lalonde, at her house on Sunday, April 18, relative to an operation, he advising it, but making no appointment with her; that on the following day, hearing nothing from him, she went out to his hospital in Pawtucket and presented herself for operation; that he made an incision into her abdominal

cavity, decided to go no further, sewed up the wound, told her she would die within a few days, and allowed her to go home that night; that on the following Wednesday, April 21, after suffering greatly in the meanwhile, she went to the R. I. Hospital, was there operated upon by Dr. Kingman and the obstruction removed; that she was confined to the hospital some six weeks, namely, until June 6, and, upon returning to her home, was unable to perform her household duties and required further treatment until October 19th.

The plaintiff's condition on Monday, April 19, was such as to necessitate the immediate performance of an operation, but the court is satisfied that the incision made by Dr. Lalonde was useless and that his conduct was characterized either by gross ignorance and a careless indifference to the plaintiff's condition or inexcusable cowardice. The neglect, operation and treatment by Dr. Lalonde greatly increased her suffering, undoubtedly prolonged her period of confinement, and is probably the cause of the pain and discomfort from which she still suffers at the place of his incision.

The testimony did not clearly show at what time the plaintiff was again able to substantially perform her household duties, but we may perhaps assume that it was within two or three months from the final visit of Dr. Harris, who had been treating her for her swollen leg. Dr. Kingman testifies that the pain and discomfort in the wound made by Dr. Lalonde might continue to the end of

her life, and plaintiff claims that she now has to stop and rest when she is doing her work, and that it is too much for her.

The court thinks that the amount of the verdict is excessive. The ailment itself and the operation required would have caused considerable suffering even if Dr. Lalonde had not intervened. The question is how much additional suffering was caused by Dr. Lalonde's treatment. The plaintiff must have recovered a considerable amount of strength as she is now doing the housework and cooking, and some washing for a family of three and her meals. She is 61 years old and has a life expectancy of 13.82 years.

No testimony was introduced as to the means of the defendant.

The court feels that a good part of the verdict is in the nature of punitive damages which, under the circumstances of the case, the jury might properly award; but as was said in *Mobile & Montgomery Railroad vs. Ashcraft*, 48 Ala. 15, "punitive damages ought to bear proportion to the actual damages sustained," and the court feels that in this case the amount is too large and that the jury was unduly prejudiced against the defendant, Lalonde. Accordingly it grants the petition of the defendants for a new trial unless the plaintiff shall, in writing, within ten days of the filing of this rescript, remit all of the verdict in excess of \$8,500.

For Plaintiff: Henry C. Hart of Curran & Hart and Charles Kiernan.

For Defendants: Huddy, Emerson & Moulton.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 26

MARCH 31, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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66 SOUTH MAIN STREET

Supreme Court Calendar

MONDAY, APRIL 3, 1922

Ex5609 P & D	Nicola Laudati vs M. De Robbio & Sons	B C
Ex5479 Atty. Gen.	State vs Enrico Romano	P & D
Ex5570 P & D	W. Roy vs Levi J. Roy	W&W-Com&C
Ex5615 JCS-CAK	P. J. Holmes vs Vincent J Oddo	L & M

WEDNESDAY, APRIL 5, 1922

Ex5481 ECS-DHM	Arthur H. Tanguay vs L. L. Graveline et al.	T L C
Ex5482 ECS-DHM	Jack Luther, p. a. vs L. L. Graveline et al.	T L C
Ex5612 C & C	Evelyn Oken vs Isadore J. Oken	G E & C
Ex5588 J F H	J. Macchia vs J. H. Ducharme	A & A

FRIDAY, APRIL 7, 1922

Ex5559 G M & H	E. A. Stevenson & Co., Inc. vs A. F. Capelli	W C & C
Ex5604 E L J	A. Langhammer et al vs A. P. Coti et ux.	J H R

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, APRIL 3, 1922

P.A.808 Lapham	M. B. Nickerson vs A. I. Remington	C R E
Eq5086 McG & S	E. E. Bevan vs A. F. Brooks (Barrows J.)	Cawley
Eq5770 Carty	J. J. Finnegan vs L. P. Andrews	
Eq5775 Bromson	Louis R. Golden vs R. Bolle Mfg. Company	
Eq5752 J P B	Max S. Pearl vs Samuel A. Pearl	R & R
Easton	C. N. Fisher, Jr. vs F. C. Fish	

TUESDAY, APRIL 4, 1922

Eq5326 P W G	Susan E. Claflin vs Robert McLaughlin	J P B
Pet.341 S I Jacobs	A. Corria vs Frick Brothers	Henshaw

WEDNESDAY, APRIL 5, 1922

Eq5727 T & C	I. M. Sweet et ux. vs W. H. McSoley et al.	W H M
Eq5744 L & McC	Roy F. Wilkins vs Frank B. Wilkins	
42328 Knauer	John P. Brennan vs J. R. White & Son, Inc.	G M & H

Jury Trial Calendar

MONDAY, APRIL 10, 1922

51374 L Semonoff	Mary K. Allen vs Providence Gas Company	S K & S
P.A.570 C & Coon	Mary H. Rutledge et al vs John J. Fitzgerald, Ex.	F & H
49160 Rivelli	Raffaele Assante vs Pasquale Chirona	P & DeP
51521 W & G	Louise G. Jelly vs William A. Henry	G H & A
45820 P & DeP	Ginnaro Onorato vs Antonio Tote, Ap.	F & M
50396 McCarthy	Rocco Di Nezza vs Antanoi Gerardi et al.	
52389 W A G	Olive M. Ottinger, p. a. vs Travelers Ins. Co.	R T B
51395 J G C	George Panagiotakopoulos vs Peter Psihoyios	A J Levy

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National Exchange Bank

63 WESTMINSTER STREET

TUESDAY, APRIL 11, 1922

47950 P & DeP	Annie Woodhead vs Annie Joost	W S F
51488 R & R	Sarah Aovitz vs Ralph Capace	Q & K
39702 McSoley	Charles N. Rose vs Cole Motor Sales Company	P & DeP
51473 G Bennett	Benjamin St. Laurent vs Martin Lippman	C Q A
49911 W C H B-V	Domenico Lombardi vs Charles F. Hurd	
43266 J G LeC	Mary E. Harris vs Western Union Tel. Co.	H E & M
49385 P C C	Thomas F. Fogarty vs Louis H. Murphy	W J B
52192 C A Walsh	James Moran vs Ernest Bolderson	C M B & L
52315 E S Chace	Matthew J. Cummings vs Alexander W. McDonald	C & Hart

WEDNESDAY, APRIL 12, 1922

49614 W A G	E. L. Briggs vs Charles W. Gerber	I Marcus
51395 Ziegler-K	Loretta Killilea vs Unitel Electric Railway Co.	Whipple-S
48138 L Semonoff	Isaac Saunders vs Sarah Satter	I S H
52014 E Atwood	Macbeth Evans Glan Company vs Millers, Inc.	Wildes
49888 G E & C	Roland E. Artic vs M. L. Kiernan	A B West
52270 G & C	Charles F. Murphy Co. vs Hope Burlap Co.	I Marcus
M.P.200 Conaty	Thomas P. McHall vs The Southern N. E. Rwy. Co.	
52013 F Hebert	Maurice O. Guerin, p. s. vs Daniel Noonan	C M B & L
51494 F Hebert	Theophile Guerin vs Daniel Noonan	C M B & L
46844 E & A	Lizzie F. Olney vs Taxi M. & T. Co.	L & McC

THURSDAY, APRIL 13, 1922

51530 A & A J	Lewis, Murphy & Co. vs Kescot Mfg. Co., Inc.	G M & H
49993 G H & A	Henry Loveridge vs M. A. Gammino Const. Co.	P & DeP
49994 G H & A	Henry Loveridge vs M. A. Gammino Const. Co.	P & DeP
50817 Bliss & W	William Heelan, p. a. vs Providence Journal Co.	R T B

50816 Bliss & W Patrick Heelan vs Providence Journal Co.
 45662 F & H Emma R. Southy vs Walter L. Clarke, C. T.
 48536 J McGough Jesse T. Baker vs Rhode Island Co.
 51213 T Farrell Henry I. Skillings vs John G. Richardson

R T B
 E S C
 Sweeney
 T J D

FRIDAY, APRIL 14, 1922

GOOD FRIDAY

District Court Appeals Calendar

MONDAY, APRIL 10, 1922

49482 C S S-F	Walter Simpson vs G. A. Mercurio & Co., Ap.	J Veneziale
51297 Slocum	Fed. Truck Sales Co., R. I. vs Israel Broomfield, Ap.	R & R
34893 W G & C	Robert Friedrich, Ap. vs Henry Lederer & Bros, Inc.	R W J
48607 C S S	Sampson Auto T. & E. Co. vs A. G. Davis, Ap.	L B & McC
51603 M & T	Union Electric Supply Co. vs James A. Doran, Ap.	C & H
51801 J H Coen	James P. Casey, Ap. vs Francis Gillies	West
30761 F & H	John F. McCaffrey vs William Cargill, Ap.	E W Blodgett
50324 Stiness	C. J. Fox Co., Ap. vs Paul Castiglioni	McG & S
49558 P & DeP	Angelo Compagnone vs James A. Venditnoli	D A Colton
48684 A H O B	Mabel C. Chamberlain vs Walter R. Berry, alias Ap.	W E Reddy
52164 Stiness	Colberts' Detective Agcy. vs George R. MacLeod	G R MacLeod
46285 B & B	David Jagolinzer vs Adolf Lelegut et al., Ap.	Wildes
52303 E C S	Belcher & Loomis Hdw. Co., Ap. vs P. A. Decker Co.	J F C
52345 B & B	Sadie Simon vs William J. McCarthy, Ap.	B & C
52631 R & R	Harry Jampolsky vs Benjamin Barber	J C S
52759 E & J S	Maud Kirker, Ap. vs Joseph Lawrence	J F M
52766 E C S-M-B	Tide W. O. S. Corp., Ap. vs Atlas A. T. & R Wks.	T McG
52300 B & B	Simon Klien vs George Berman, Ap.	I Marcus
51076 G M & H	Mark Shepard vs Arthur L. Stone, Ap.	S & S
52292 G K & G	W. B. Smith Whaley, Jr. vs W. P. Hamblin	G F & C
49480 C Z A	Louis Rozepsky et al vs Benjamin Branstin, Ap.	B & B
49469 McG & S	John S. Fiore vs Michele Mandella, Ap.	R & H
52623 J V	Arthur Ferrara et ux. vs Philip Block, Ap.	G R MacLeod

TUESDAY, APRIL 11, 1922

51287 Bowen	Tart Brothers vs Harry C. Sutcliffe, Ap.	Veneziale
51295 Bowen	H. M. Ruddy vs Harry C. Sutcliffe, Ap.	Veneziale
51305 Slocum	A. T. Jeannotte vs A. Odette, Ap.	Walsh
49858 R T B	Seamans & Cobb Co. vs Guerino Costanzo	P & DeP
51729 Slocum	Jos. A. Hull, Ap. vs Charles T. Dorrance	W & W
51737 Stiness	Nathan Kaufman Co. vs Progressive Mfg. Co., Ap.	M & T
51739 M & T	Progressive Mfg. Co., Inc., Ap. vs N. Kaufman Co.	Stiness
50302 B & B	Isaac Beck vs H. Hecker, Ap.	R & R
51970 McK & B	Herbert C. Anderson vs Albert DiMeo, Ap.	L V J
52430 McK & B	Jackson Furniture Company vs Mary Souza, Ap.	J A H
50371 Q & McK	Frank E. Duffey vs Albert W. Moquin, Ap.	T J D
46896 P & DeP	Morris L. Sackin, Ap. vs Henry Rock	W H McS
52050 McK & B	Ulderic Loiselle, Ap. vs Josephine Clark	T & C
52698 L S	J. Fried, Ap. vs Arlance Leveille	F J D
52699 G M & H	Chas. Devorchak et al vs Chas. Cranshaw, Ap.	F L H
52700 E H Z	Patrick Cunningham vs Joseph Finnigan, Ap.	F J D
52705 E C S	Belcher & Loomis Hdw. Co., Ap. vs Blue R. L., Inc.	S S B
52661 J E B	Walter L. Kelley vs Miles T. Jensen, Ap.	I F N
52902 H E & M	Sophia Wanelik et al. vs Adolf Mrose, Ap., T. & E.	F H W
52225 B & C	A. Baso & Son vs Barney Potter, Ap.	J T W
5226 B & C	Union Leather Company vs Barney Potter, Ap.	J T W

WEDNESDAY, APRIL 12, 1922

50102 Arnold	Howard Dodge, p. a. vs Bryant & Stratton C. S.	Com & C
51023 Costello	The Sweat Comings Company vs Cohen & Co., Ap.	McM
51307 Slocum	Federal T. S. Co., R. I. vs Bessie E. Billows, Ap.	Q & K
51583 F P D	Anthony G. Silva vs William C. Vreeland, Ap.	S & L

51550 P & DeP	Michele Frenze vs Rocco Celetto, Ap.	D A C
50060 Stiness	United Limb & Brace Co. vs Samuel Priest, Ap.	I M
52042 P E D	Antoin Lawranowicz, Ap. vs Michalena Kozloska	J O
51964 J O	Michalena Kozloska vs Magdaline Markowski, Ap.	P E D
47581 J L J	Royal Weaving Company vs S. Bander, Ap.	C & C
49454 Stiness-B	Flint Dental Mfg. Co. vs Hersh Dental Sup. Co., Ap.	R & R
47751 McG & S	John S. Eagan vs Sam Shoulson, alias Ap.	R & R
51968 McK & B	Jean B. Caouette, Ap. vs Ernest Blanchett	G W B., Jr
52489 C S S	Central Auto Tire Co. vs John E. Collette, Ap.	W A G
43274 T P C	James B. Brown vs Alfred Bent, Ap.	P J Q
51589 C S S	Sam Saroian vs Harry J. Sarkesian, Ap.	J R
51590 C S S	Sam Saroian vs Hagop Setiopian	J R
49725 J V	Vincenzo Faggino, Ap. vs Nicola Leone	P & DeP
49726 P & DeP	Nicola Leone vs Vincenzo Faggino	J V
52697 J P B	Hoefler Fisher Co., Ap. vs Howard L. Anthony	J M & H
51550 P & DeP	Michele Frenze vs Rocco Celetto, Ap.	D A C
49555 P & DeP	Enrico Almantì vs Burt Sterns, Ap.	F H W
52492 Sullivan	J. C. Hall Co. vs W. B. Smith Whaley, Jr., Ap.	G K & G
49737 J V	Mario Ticocelli et al vs Francesco DiAngelis, Ap.	C & DeS

THURSDAY, APRIL 13, 1922

51310 Slocum	Jennings & Co., Inc. vs John Milikian et al.	R
49745 McK & B	Henry N. Bebeau vs Sarah Janigian, Ap.	J R
44751 M & T	Spencer M. P. Co. vs Broadway T. E. Co., Inc., Ap.	P C J
51787 Stiness	Eastern Chain Co., Ap. vs W. M. H. Bell	W T O'D
51959 Atwood	Commonwealth H. C. Co. vs Effie M. Mix, Ap.	L F N
51589 Slocum	Sam Saroian vs Harry J. Sarkenian, Ap.	J R
49764 Stin-M-B	The Allen School, Ap. vs Cora H. Mercer	Q & K
52174 J E S	Lena Conley vs Ralph D. Gilman, Ap.	G C C
51557 Stin-M-B	Franklin Machine Co., Ap. vs Henry Hischer	W W O
50853 J V	Rosina Seva vs Benjamin Stini, Ap.	P & DeP
50855 P & DeP	Oceanic C. & S. Co. vs M. Francis, Ap.	J V
45262 T P C	Victor Guertin vs Samuel McGray, Ap.	T F V
51978 McK & B	Jackson Furniture Co. vs Beni. Robbins, Ap.	T J D
52431 C S S	Mike Morrison vs Domenico Valenti, Ap.	Pro se Ipso
52445 C S S	G. W. Crafford vs E. T. Metcalf, Ap.	G H & A
50804 J E B	Robert T. Collins vs Frank J. Killian, Ap.	J H
52650 J E B	Joseph J. Cullen vs Noah Bogin	J G C
52765 McG & S	Fannie A. Blunt vs Nettie Wilcox, Ap.	M & T
51912 A N P	Larcher Horton Co. vs Kenyon B. Ely, Ap.	G E & C
52706 P & S	John Roddick vs William A. Orme, Ap.	F & M

FRIDAY, APRIL 14, 1922

GOOD FRIDAY

SUPREME COURT

John Garst
vs.
John G. Canfield et al.

Ex. &c. No. 5513

(Before Barrows, J., Below)

OPINION

RATHBUN, J. This is an action in assumpsit commenced in the Superior Court. The original writ was served on the Mechanics National Bank for the purpose of attacking the personal es-

tate of the defendant in the hands and possession of said bank. The return of said bank shows that at the time of the service of said writ there was on the books of said bank the sum of \$5014.13 credited to "John G. Canfield Company, Manager." Arthur J. Mitchell & Company, Inc., made claim to the attached fund and on motion was made a party to the suit in so far as title to said fund was concerned. After decision in the original action for the plaintiff and

before entry of judgment the plaintiff made a motion to charge said bank as garnishee to the extent of the amount disclosed. After a hearing said court denied said motion and granted a motion of said Arthur J. Mitchell & Co., Inc., the intervener, to discharge the garnishee, and also decided that the fund in question was the property of the intervener. The case is before this court on the plaintiff's exceptions to the rulings of the trial court on said motion and to the decision of said court that the fund in question was the property of the intervener.

It appears from the evidence that John G. Canfield was appointed agent to represent the intervener in the sale of stocks in Rhode Island. By the terms of the employment it was the duty of Canfield to solicit subscriptions for stocks, obtain from each subscriber a check for the full amount of the price of the stock subscribed for and remit to the intervener sixty per cent. of the amount received. Each subscription agreement provided that Arthur J. Mitchell & Co., Inc., was at liberty to accept or reject the subscription. Canfield was required to have all checks for stock made payable to the order of Arthur J. Mitchell & Co., Inc. Canfield was required to indorse the check for collection and permitted to retain as a commission forty per cent. of the amount received. From his commission Canfield paid all of his expenses incident to the business, including office rent, remuneration to sub-agents, purchase of supplies, etc. It was the regular course of business for the intervener on receipt of sixty per cent. of the subscription price of a stock to send the stock certificate to Canfield, who delivered the same to the subscriber.

Canfield, after receiving the appointment, opened an account in said Me-

chanics National Bank in the name of "John G. Canfield Company, Manager." In this account he deposited checks which he received from subscribers in payment for stock. It does not appear that money from any other source than checks received in payment for the intervener's stock ever went into this account. On August 24, 1920, the plaintiff, by the original writ in the action, attached by trustee process said account. It appears from the evidence that Canfield deposited in said account checks (all of which were collected), which he had received in payment for intervener's stock to the amount of \$8,530, and that the intervener was entitled to receive sixty per cent of said amount, that is, \$5,118. It is evident that Canfield had drawn for his own use more than forty per cent., his share of the amount collected through the bank, as there was but \$5,014.13 in said account at the time of the attachment. Canfield, having drawn from said account more than forty per cent. of the funds received from the sales of stock, the intervener contends that the whole of the attached fund is the property of the said Arthur J. Mitchell & Co., Inc., the intervener.

The fundamental question is whether the mere relation of debtor and creditor existed between Canfield and the intervener or whether Canfield was acting in a fiduciary capacity in collecting checks through the bank and remitting sixty per cent of the proceeds to the intervener. What was the intention of the parties? The trial court evidently found that it was the intention of the intervener and Canfield that the latter should hold in a fiduciary capacity the proceeds of stock subscriptions. The findings of the trial court on questions of fact are entitled to great weight and we are unable to perceive how said court could

have arrived at any other conclusion. See *Nat'l. Bank vs. Ins. Co.*, 104 U. S. 54. The material facts bearing upon this question are undisputed. Canfield sold securities for the intervener. The securities were not sold on credit or otherwise to Canfield for the purpose of resale. It was his duty to obtain subscriptions and in each instance a check payable to the intervener for the purchase of the stock.

After forwarding sixty per cent. of the subscription price to the intervener Canfield received from the intervener the stock certificates which he delivered to the customers. The intervener was at liberty to accept or reject all of the subscriptions. The subscription agreement contained the following: "In case this application is not accepted for any cause the amount paid will be returned promptly." * * * * "Make all checks payable to Arthur J. Mitchell." "Notice: If you do not receive an acknowledgment in ten days write Arthur J. Mitchell, Chicago, Ill." Canfield made weekly reports to the intervener. These reports, which are signed by Canfield, show the relation of the parties. Each report is a salesman's account with his principal. Each report shows the name of each subscriber the amount of the subscription, the amount of the commission and the amount to be remitted. Each report was accompanied by a check drawn against said bank account for sixty per cent. of the subscription price on all orders reported. Each report contained also a receipt signed by Canfield, acknowledging the receipt by him of his commission. If the money belonged to Canfield and he was a debtor for a part of it to the intervener, why did Canfield receipt for his own money? Canfield, in taking subscriptions for stock, was required to obtain from the subscriber a check for the purchase price payable to

the order of the intervener. The money represented by this check was the intervener's money. Canfield was authorized as "manager" for the intervener to indorse the check for collection. He was required to collect the check by depositing it in the bank to the credit of an account in the name of "John G. Canfield Company, Manager." He was required to promptly report the subscription and at the same time remit by check drawn against said account for sixty per cent. of the subscription price. It is clear from the testimony that Canfield and the intervener, never intended to create the relation of debtor and creditor between themselves.

It is contended by the plaintiff that Canfield is the owner of at least forty per cent. of the fund attached. As we have already stated, it is evident that Canfield drew for his own use from said account more than his commissions, that is forty per cent. of the money received for stock subscriptions. If a trustee mingles in a bank account his own money with trust funds and then makes withdrawals for his own use the law is settled that he will be presumed to have used his own money to the extent that he had money in the account. If such withdrawals exceed the amount of his own money in the account and he afterwards deposits other money of his to the same accounts, courts will assume that it was his intention in making such deposit to make the trust fund whole. *Hungerford vs. Curtis*, 43 R. 1., 110 Atl. 650; *Slater vs. Oriental Mills*, 18 R. I. 352, 27 Atl. 443. See *Nat'l. Bank vs. Ins. Co.*, 104 U. S. 54. As Canfield in the bank account in question mingled his own money with trust funds which he held for the intervener and as the trust fund is incomplete because of Canfield's withdrawals for his own use of more than the amount of his money mingled in the

account, it follows that the whole of the balance belongs to the intervener.

The plaintiff contends that the intervener should be denied access to the courts of this State for the reason that the intervener was during the time when the funds in question were being deposited in said account a foreign corporation, doing business in this State without having appointed a resident attorney in this State upon whom process might be served, required by Chapter 1925 of the Public Laws. Section 67 of said chapter, after imposing a penalty upon foreign corporations and its officers for transacting business in this State without complying with certain provisions of said chapter, including the provision requiring the appointment of a resident attorney, contains language as follows: "Such failure shall not affect the validity of any contract with such corporation, but no action at law or suit in equity shall be maintained or recovery had by any such corporation on any contract made within this State in any of the courts of this State as long as it fails to comply with the requirements of said sections." But the intervener had appointed a resident attorney upon whom process might be served and had in every respect complied "with the requirements of said sections" before it sought the aid of our courts.

Said Chapter 1925 amends, and to a considerable extent supersedes, Chapter 300 of General Laws, 1909. Section 42 of said Chapter 300 has been construed by this court. Said section provides that no foreign corporation (with certain exceptions not material to this case), "shall carry on within this State the business for which it was incorporated, or enforce in the courts of this State any contract made within this State, unless it shall have complied with the following sections of this chapter." "The

following sections" require, among other things, the appointment of a resident attorney upon whom process may be served. In construing said sections this court held in *Swift vs. Little*, 28 R. I. 109, that a foreign corporation might enforce in the courts of this State, a contract which such corporation had entered into within this State, although said corporation had not complied with the statute by appointing a resident attorney at the time the contract was made, provided the corporation appointed a resident attorney, as required by statute, before commencing suit. The construction adopted in *Swift vs. Little*, supra, has been for many years the accepted construction of Section 42 of said Chapter 300. See *Frank vs Broadway Tire Exchange*, 42 R. I. 27. Had the Legislature with a presumed knowledge of said construction intended to deny to a foreign corporation the use of our courts to enforce a contract made within this State before said corporation had complied with our statutes requiring appointment of a resident attorney, when said corporation had fully complied with said statute before seeking the aid of our courts the Legislature would not have declared that "such failure shall not affect the validity of any contract with such corporation" and proceeded with the language, "but no action at law or suit in equity shall be maintained or recovery had by any such corporation on any contract made within this State in any of the courts of this State so long as it fails to comply with the requirements of said sections."

All of the plaintiff's exceptions are overruled and the case is remitted to the Superior Court for further proceedings.

For Plaintiff: Curtis, Matteson, Boss & Letts.

For Defendant: Waterman & Greenlaw.

SUPREME COURT

Julius Nass
vs.
Annie L. Garniss

} Ex. &c. No. 5533

(Before Brown, J., Below)

OPINION

RATHBUN, J. This is an action of trespass and ejectment to recover possession of a certain tenement occupied by the defendant as a tenant of the plaintiff's from month to month. The case is before this court upon the plaintiff's exception to the ruling of the justice of the Superior Court, who presided at the trial non-suiting the plaintiff.

The plaintiff bases his claim of right to possession upon a written notice to vacate which he served upon the defendant for the purpose of terminating the tenancy.

Said notice was as follows:

"Newport, Rhode Island

October 13th. 1920.

Mrs. Annie I. Garniss,

314 Broadway,

Newport, Rhode Island,

Madam. Whereas you as tenant from month to month now hold of the undersigned a tenement or apartment known as and numbered, 314 Broadway. in said Newport, Rhode Island. and whereas the undersigned is desirous of terminating said tenancy, you are hereby notified to vacate and deliver possession of said tenement or apartment at the end of your occupation month which will occur next after the expiration of fifteen days from the date hereof.

JULIUS NASS."

General Laws, 1909, Chapter 334, Section 4, provides that "Tenants by parol of lands, buildings, or parts of buildings,

for any term less than a year, shall quit at the end of the term upon notice in writing from the landlord given at least half the period of the term, not exceeding in any case three months, prior to the expiration of the term."

It was the plaintiff's intention in giving said notice to avail himself of the provisions of said Section 4 by giving the defendant a notice equal to "at least half the period of the term." The plaintiff had occupied the tenement for several months as a tenant from month to month, but the term which the plaintiff sought to terminate commenced October 1, 1920. Said notice was served October 13, 1920. The non-suit was based on a ruling of said justice that said notice directed the defendant to vacate not at the end of her term but before the end thereof, that is, October 28, 1920. Said justice construed said notice to require the defendant to vacate on the expiration of fifteen days from the date of the notice. We do not think the language of said notice is susceptible of such construction or that the defendant could reasonably have had any doubt as to the time when she was required by the terms of the notice to vacate. No particular form of notice is necessary to terminate a tenancy. The notice will be sufficient if it is in writing and informs the tenant that he is required to vacate the premises at the end of his term and is given before the commencement of the latter half of the term. The notice need not state when the term ends as a tenant for a term must be presumed to know when his term commences and when it ends. The language of the notice material for our consideration is as follows: "Vacate * * * at the end of your occupation month which will occur next after the expiration of fifteen days from the date hereof." The antecedent of the relative

pronoun, "which," is unquestionably the noun, "end." Said notice contains a direction to vacate "at the end" (of your occupation month) "which will occur next after the expiration of fifteen days from the date hereof." The occupation month commenced October 1, 1920, and ended at midnight, October 31, 1920. Said notice was served October 13, 1920, The "end" (of your occupation month) which occurred "next after the expiration of fifteen days" occurred at the end of the thirty-first day of October, 1920. A tenant has a right to occupy during the full period of the term. The defendant had a right to remain in possession of said tenement during the whole of the last day of October, 1920. *Waters vs. Young*, 11 R. I. 1. Said notice directed the defendant to vacate not during her term but at the end thereof, that is, on the day succeeding the last day of the term.

There being thirty-one days in the month of October and as the term ended on the last day of said month, the defendant was entitled to a notice of sixteen days instead of fifteen, as implied by said notice, but this error is of no importance. See *Congdon vs Brown*, 7 R. I. 19. The defendant received a notice of more than sixteen days and a notice more than equal to one-half of the period of the term. In our opinion said notice was sufficient to terminate the tenancy.

The plaintiff's exception is sustained and the case is remitted to the Superior Court for a new trial.

For Plaintiff: J. A. Sullivan and Max Levy.

For Defendant: Frank F. and John H. Nolan.

SUPREME COURT

The B. F. Goodrich Rubber Company	} Ex. &c. No. 5548
vs.	
Millers, Incorporated	

(Before Sumner, J., Below)

RESCRIPT

This is an action of assumpsit brought by the plaintiff to recover for the value of certain automobile tires sold by the plaintiff to the defendant. The case was tried before a justice of the Superior Court sitting with a jury. At the conclusion of the testimony the trial justice directed a verdict for the plaintiff for \$1145.76, the full amount of plaintiff's claim with interest. The defendant duly excepted to this action of the trial justice and by its bill of exceptions, which are now before this court, two questions are raised, namely: Did the trial justice err in directing the verdict for the plaintiff, and was there error in the admission and rejection of certain testimony?

The defendant admits that the verdict of the jury is correct in so far as it allows plaintiff's claim, but claims that it was entitled to a set-off under its plea of set-off to the amount of \$2728.44, which amount defendant claimed plaintiff owed to it, the defendant, and which if allowed would leave a balance of \$1649.06 owing from plaintiff to defendant.

Defendant has been a customer of plaintiff for several years and during that period had bought a large number of automobile tires. Whenever price reductions were made by plaintiff there is testimony that defendant, as well as other customers of plaintiff, was entitled to receive a rebate upon the stock held by it proportionate to the amount of the

price reduction made by the plaintiff. The plaintiff and defendant differ as to the time which such price reductions applied to, but this fact is not material.

In March, 1920, the President of the defendant company testifies that he visited the Providence office of the plaintiff company and there saw a young man branding tires with the letters, N. F. C. (meaning "not first class"); that the young man told him the tires were first-class tires which were being branded N. F. C. and were to be sold at twenty-five per cent. under the list price for first-class tires. The defendant produced no evidence that these particular tires were first-class tires or that they were ever sold, but bases its claim to recover twenty-five per cent. rebate on the tires it then held in stock on this statement made by an unidentified employee of the plaintiff company. Opposed to this is the testimony of one of the plaintiff's officials that the tires were not in fact first-class tires and that the number of tires sold marked N. F. C. was less than one per cent. of the amount sold in this district and throughout New England. So far as appears the number of tires so marked was not in excess of seventy-five. There is no evidence that these tires were ever sold and, other than the statement of the employee above referred to, it appears from the testimony of the agent of the plaintiff company that the tires so branded were of an inferior quality. It further appears that the matter of quality could not be determined by a mere casual examination of the tires but could only be determined by a thorough inspection thereof.

Without further discussion of the testimony we think that the defendant failed to show that there had been any price reduction by the plaintiff which entitled him to any rebate and that there was no evidence of any value which would war-

rant the jury in finding that the defendant had established its claim to a set-off.

There was no error in the action of the trial court in disallowing the set-off and in directing a verdict for the plaintiff.

The exceptions to the admission of testimony are unimportant and we find no error in the rulings of the trial justice in this respect.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment upon the verdict.

For Plaintiff: E. C. Stiness.

For Defendant: F. H. Wildes.

SUPREME COURT

Wilhelmina Roy

vs.

Levi J. Roy

} Ex. &c. No. 5570

(Before Blodgett, J., Below)

OPINION

VINCENT, J. On March 20, 1920, Wilhelmina Roy filed her petition in the Superior Court against her husband, Levi J. Roy, praying for a divorce from bed and board and from future cohabitation, and for an allowance for support and maintenance until such time as the parties should become reconciled.

The petition was heard in the Superior Court and a decision rendered for the petitioner, granting her a divorce from bed and board and future cohabitation with the respondent, etc. The case is now before us upon the respondent's exceptions: (1) To the refusal of the trial court to dismiss the petition; (2) To the refusal of the court to admit certain testimony offered by the respondent; and (3) To the decision of the trial court granting the prayer of the petition.

It appears that the marital discords

and dissensions of this couple have been brought to the attention of the Superior Court upon two previous occasions. In July, 1914, the respondent here filed a petition for divorce which was heard and denied. On February 8, 1919, he filed another petition, which was also heard and denied.

In connection with the last-mentioned petition of Levi J. Roy, the respondent, now the petitioner here, filed a motion for an allowance for support and for witness and counsel fees. After a hearing "on oral testimony and agreements of counsel" a decree was entered, March 1, 1919, ordering the petitioner to pay to the respondent certain sums of money, including fifteen dollars per week for her support, beginning on March 3, 1919.

On July 10, 1919, this second petition of Levi J. Roy was denied and dismissed. It is undisputed that Mrs. Roy received fifteen dollars per week between March 3, 1919, and July 10, 1919, in accordance with the terms of the decree before referred to.

There is some contention now, in the case at bar, as to whether the payments of Mr. Roy in the prior suit were voluntary or involuntary. The respondent claims that they were voluntary and therefore were like any other expenditures for the benefit of the petitioner. On the other hand, the petitioner claims they were involuntary and that the time covered thereby is available to her in calculating the period of the respondent's failure to supply necessities. They were evidently made in pursuance of a decree of the Superior Court following and based upon the motion of the respondent in that case for an allowance. How far the parties through their respective counsel may have consented to the form and provisions of the decree does not appear, but we see nothing in the papers in that case which would lead us to char-

acterize such payments as "voluntary."

However it does not seem to us to be material whether such payments were made voluntarily or under the compulsion of the decree. They were made, and the advantages arising therefrom to Mrs. Roy would be the same in either case. It was within her discretion to apply for the allowance or to refrain from doing so. Having chosen to make the application and having received the money paid by her husband, we do not think that she can now claim that he has neglected and refused to furnish her with the necessities of life during the period covered by such payments.

The present petition, filed March 20, 1920, alleges the failure of the respondent to furnish necessities for more than one year prior thereto, that being the minimum period required by the statute in such cases. This is in effect an allegation that the respondent has neglected to provide for her support since March 20, 1919. But from March 3, 1919, to July 10, 1919, the petitioner was receiving fifteen dollars per week from her husband for her support under the order and decree of the Superior Court.

We think that the present petition was prematurely filed and for that reason it should have been dismissed.

The exception of the respondent to the decision of the trial justice, granting the petitioner a divorce from bed and board and future cohabitation is sustained.

The petitioner may appear before this court, if she shall see fit, on April 3, 1922, at 10 o'clock a. m., and show cause, if any she has, why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition.

For Petitioner: Pettine & DePasquale.

For Respondent: Cooney & Cooney
and Walling & Walling.

SUPREME COURT

Carlo Golato
vs.
Giuseppe A. Mercurio

} Ex. &c. No. 5571

(Before Blodgett, J., Below)

RESCRIPT

This is an action of assumpsit brought by the plaintiff to recover a balance which he alleges to be due him as a part of the consideration for the sale to the defendant of a macaroni factory.

The case was tried in the Superior Court before a justice thereof sitting with a jury and a verdict was rendered for the plaintiff in the sum of \$627. The defendant's motion for a new trial was heard and denied and the case is now before us on the exceptions of the defendant's objections to questions; and exception to the ruling of the trial court denying the motion of the defendant to direct a verdict; and an exception to the refusal of said justice to grant the motion of the defendant for a new trial.

The parties to the suit entered into an agreement by which the plaintiff was to sell and the defendant to buy a macaroni factory upon terms which were apparently agreed upon. The only question involved, is whether the defendant paid the entire amount due the plaintiff and if not what is the balance due.

Each of the parties testified in his own behalf. There was no other testimony.

The questions which arose were purely questions of fact upon which the testimony of the parties was contradictory. It was for the jury to determine which of the parties was entitled to belief. There was sufficient testimony to support the verdict, the trial court has ap-

proved it in all respects, and we cannot say that its conclusions in that regard are erroneous.

We find no merit in the defendant's exceptions and they accordingly overruled.

The case is remitted to the Superior Court with direction to enter judgment for the plaintiff on the verdict.

For Plaintiff: James B. Littlefield
and Louis V. Jackvony.

For Defendant: Pettine & DePasquale.

SUPERIOR COURT

Frank K. Stevens
vs.
Claire F. Stevens

} Div. No. 14838

RESCRIPT

CAPOTOSTO, J. The sum of \$85 a week is allowed respondent for the support and maintenance of the said respondent and her three children and for all household expenses, excepting fuel, gas and electricity, which shall be provided and paid for by the petitioner. This payment is to begin as of March 11, 1922.

The sum of \$500 is allowed for counsel fees, provided, however, that application for a further allowance may be made if justified by subsequent developments.

For Petitioner: Waterman & Greenlaw.

For Respondent: Flynn & Mahoney,
Fitzgerald & Higgins.

SUPERIOR COURT

Shepard Company

vs.

General Motors Truck Co.

} No. 32552

RESCRIPT

TANNER, P. J. This is an action for breach of a contract of sale of motor trucks by the defendant to the plaintiff, and is heard upon demurrer to the declaration.

It is admitted by the plaintiff that the demurrer should be sustained in several particulars. The demurrers, therefore, sustained in these particulars.

The main ground upon which the plaintiff defends the declaration is against the charge that the special count is duplicitous because it contains several breaches of the different warranties contained in the contract.

We think that the demurrer should be overruled on this ground. It is not duplicitous to allege a single breach each of several different promises or warranties in a single contract.

13. Corpus Juris, 733.

Smith vs. Boston & C. R. R. Co., 36 N. H. 458.

Fiske vs Tank, 12 Wis. 298, 299.

1st Chitty on Pleading, 250, 251.

Andrews Stephen's Pl., 2nd Ed., Sec. 176.

Another ground of demurrer was that it was stated in the declaration that immediately upon the delivery of each and every one of said trucks to the plaintiff, each and every one of the foregoing

guaranties from the defendant to the plaintiff contained as aforesaid in said contract was broken by the defendant.

It may be true that some of these guaranties could not have been broken immediately, but the declaration does not point out which ones could not have been so immediately broken. Furthermore, the demurrer admits the truth of the facts alleged.

Therefore, the demurrer is overruled.

For Plaintiff: Comstock and Canning.

For Defendant: Edwards & Angell.

SUPERIOR COURT

Maria Felicia Ciaccia

vs

General Fire Extin-
guisher Co.

} Agmt.

} No. 15377

RESCRIPT

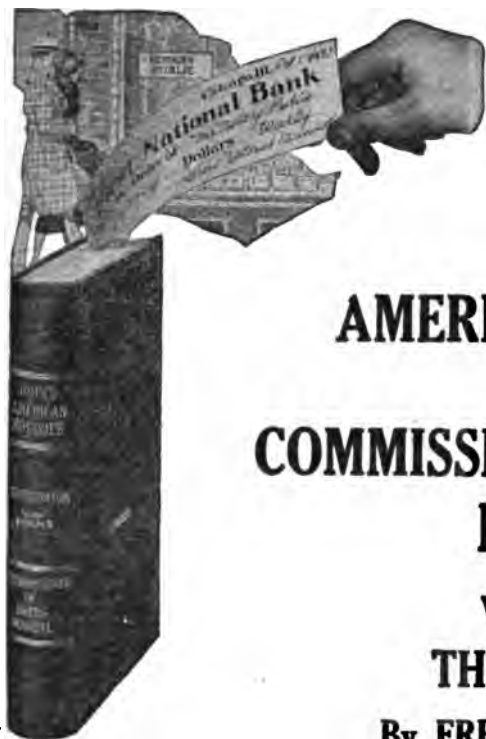
TANNER, P. J. This case is heard upon the complainant's petition for commutation.

It appears that the petitioner has a half interest in a small farm in Italy, where she testifies that she can live much cheaper than she can in this country and where her children can work on the farm; that her oldest son, who has been helping her, is about to get married and can no longer afford assistance; that it is therefore for her best interests to have said payments commuted and return to Italy, and that she desires to and is about to return to Italy.

Upon these facts we grant her petition for commutation.

For Petitioner. P. Romano.

For Respondent: R. T. Barnfield.



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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 27

APRIL 7, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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66 SOUTH MAIN STREET

Supreme Court Calendar

MONDAY, APRIL 10, 1922

Eq 532 I M
Ex5609 P. & D

Iona Specialty Co. vs Mary Goldschine
Nicola Laudati vs M. DeRobbio & Sons

B & B
B C

WEDNESDAY, APRIL 12, 1922

Ex5593 S & H
Ex5561 J C S
Ex5562 R & R
Ex5615 C A K

A. Cascombas vs F. H. Swan et al.
Fannie Seltzer vs J. Greene
Joseph Greene vs Fannie Seltzer
P. J. Holmes vs V. J. Oddo

H & E
R & R
J C S
L & M

FRIDAY, APRIL 14, 1922

GOOD FRIDAY

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, APRIL 10, 1922

Asst174 G H B
Eq5113 G M & H
Agmt9493 GM&H
Eq5752 J P B
Eq5669 C R E
Eq5624 W & G

In re-assignment of Jos. Najarian
Contrexville Mfg. Co. vs Oswegathie Textile Co.
C. Verdolotto vs G. A. Fuller et al.
Max S. Pearl vs Samuel A. Pearl
Margaret Boffi vs Anthony Albanese
Samuel Krebbs vs Bessie L. Fenner et al.

Rustigian
Curtis-Letts

R & R
Cooney & C

TUESDAY, APRIL 11, 1922

Pet301 H A C
51155 McG & S
46939 J H C
52883 J H C
52950 Com & C

Anna F. Strandquist vs H. A. Rice, Atty. Gen.
F. Andruski vs Maryland Motor Car Ins. Co.
F. E. Donahue vs Frank C. Pettis
Mary A. Donahue vs Frank C. Pettis
C. W. O'Brien vs S. H. Moskol

C P S
T M O'R
GAS F&H
GAS F&H
McG & S

WEDNESDAY, APRIL 12, 1922

49162 G H & A
Eq5487 H E & M
Assgt171 Stin-M-B
52694 C R B
52785 J F H

M. L. K. Lalonde vs L. Lalonde
H. J. Allen vs Perry Mfg Co.
In re-assignment of Manuel A. Silva
V. Sczerbuisrski vs M. Robinson
William Brennan vs F. H. Lake

H & S
A H Lake

Jury Trial Calendar

MONDAY, APRIL 17, 1922

49622 F & H
51492 F & M
51753 J V—B
51789 W N McS
51823 Ziegler-G
48330 C & DeS
51955 E D H

Harold C. Pearson vs Arthur Lepper
Ferdinando Fainardi et al vs Emanueke Pausato
Gughelino Garzone vs Antonio Gasbarro
Michaels-Bauer, Inc., vs Max Kusch
Michael McHale vs O'Gormans, Inc.
Gillippo Squillace vs Gaetano Gabirille
Howard Taylor vs Norman Harris

R & H
R J McM
McG & S
McG & S
R T B
B & V
P & S

51956 E D H	Howard Taylor vs Norman Harris	P & S
48511 R&R—W&G	City of Providence vs Hermann Doll et al.	L B & McC
52321 J H C	Jonathan Andrews et al vs John E. Fenton et ux.	W J H
51626 Stiness-M	Clifford G. King vs Arthur I. Clark	C & B
51898 J E B	Jonathan Andrews et al vs Antonio Dos Santos	B & B
44392 P C J	B. Flink & Son vs Pacific Vinegar and Pickle Wks.	G H & A
50515 P & DeP	Evaristo Nanni vs Samuel S. Merlo et als.	J L C
52460 P C J	Eastern Beef Co. vs A. M. Narriett	B & B
51718 P & DeP	Guiseppina Marsello vs Norton Taxi Motor Co. et al	L B & McC

TUESDAY, APRIL 18, 1922

46605 T & L	James S. Orr vs John R. Butterworth	J H
50192 E A S	Butler Ex. Co. vs Fess Rotary Oil Bur., Inc., et al	W & G
44867 B & B	L. Werber vs J. Alper	R & R
51697 P & DeP	Francesco Coppa vs Giuseppe Demarco	W C H B
50640 P & DeP	John Salvati vs Placido Caparone	L V J
50461 P & DeP	Luigi Salvati vs Placido Caparone	L V J
49511 S—M—B	I. Feder vs M. Sherman	C S S
51997 Harlow	Anthony Maccia vs Joseph H. Ducharme	A & A
50225 J L J	Richard P. Norton vs Edward J. Carty	T L C
51161 J A E	Manuel Sousa vs Sodini & Guisti	E R W
50503 J V	Palemo Basile vs Angelo Diorio	G H R

WEDNESDAY, APRIL 19, 1922

51223 T F V	Octave Cote vs Louis Laferriere	P E D
51231 R & R	John Prendergast, p. a., vs Elizabeth A. Robinson	G H & A
50284 T F V	Eva Regnault vs Minnie Rosenthal	S N
52117 Z—K	Victor Sciana, p. a., vs John Bashaw	L & McD
51860 F & H	Edward Sullivan, p. a., vs United Elec. Railway Co.	C W
51861 F & H	William F. Sullivan vs United Electric Railway Co.	C W
49031 B & B	Seaboard Flour Co. vs D. DiLuglio	P & DeP
45298 T J D	Mary C. Hackett vs Margardek Najarian, alias	B F L
50190 W A G	Geo. E. Withington vs London Guar. & Ac. Co., Ltd.	W C & C
45974 P & DeP	Michele Del Monaco vs Sperry Engineering Co.	W & G

THURSDAY, APRIL 20, 1922

51230 R & R	Aram Kevorkian vs Henry D. Sharp	B S & L
51420 McK & B	Charles Miller vs Charles T. Smith Co., Inc.	R T B
51476 R & H	William H. Goodby vs Esther Lagerquist	E D H
51399 W M P B	James A. Donnelly vs Warren Mfg. Co.	D H M
49341 J V	John Russo vs Joseph H. Davis	W S F
50287 F & H	Camille LaPlante vs Thomas T. Wood et al.	
46850 L B & McC	City of Providence vs Stephen H. Dailey et al.	McG & S
50720 O'S T & C	Dennis J. Sullivan vs The R. I. Co.	C—W
50723 O'S T & C	Mary E. Sullivan vs The Rhode Island Co.	C—W
51233 E R W	Edward R. Glines vs John E. Pugh	Q & K
52186 J F H	Jarres B. Russell vs Rocco Germaine	T F V
51377 C A K	Sofia Bartosszewicz vs Anna Nikitcz	
46849 P & DeP	Arcangelo Sardiello vs Crown Clothing Co.	F—K W
51752 McG & S	S. Tourtellot & Co vs F. Davis & Co., Inc.	B&M-F&H
50988 Stiness-M-B	D. Straus Co., Inc. vs Merchants Tail. Trim. House	B & B
49135 R & R	Joseph Barb vs Michael Paliano	C & DeS
49134 R & R	Manuel Costa vs Michael Paliano	C & DeS
52809 J E B	Ovila W. Frechette vs Wilfrid A. Fregault	
44066 B C	Giuseppe Vocola vs Vito N. Familgietti	P & DeP

FRIDAY, APRIL 21, 1922

49593 Dorney	Wallace L. Maius vs Thomas J. McLoughlin	R T B
51415 Ziegler-K	Leonardo Casacelada vs Charles Sipschitz	R & R
51172 P & DeP	Pietro Picerno vs Antonio Abruzzese	J V—B
52087 W C & C	Philip S. Lenz, p. a. vs Harriet Lund	R T B
52088 W C & C	Willard A. Lenz vs Harriet Lund	R T B
52185 Stiness-M-B	S. & G. Trucking Co. vs Maine Creamery Co.	G E & C
52313 Ball-G	Frank B. Grover vs Howard J. Duhamel	J W G
49674 J F C	Oscar Q. Olson vs Comstock & Co.	W A S
41862 E & A	William Handley vs John F. O'Gorman	L F M
51549 G M & H	M. Steinert & Sons, Inc., vs Louis H. Barod	C R E

SUPREME COURT

Melkon Semonian
vs.
James Panoras } Ex. & C. No. 5586

(Before Sumner, J., Below)

OPINION

SWEENEY, J. This action of trespass de bonis asportatis to recover the value of a pop-corn machine. After a trial in the Superior Court the jury returned a verdict for the plaintiff in the sum of \$627.87. The defendant's motion for a new trial was denied and he has duly prosecuted his exceptions to this court.

It appears from the record that the writ was issued August 14, 1918, and was duly filed in court with a declaration containing two counts, one alleging trespass de bonis and the other trover and conversion of a pop-corn machine. The defendant filed a plea of the general issue, and a special plea stating that when he committed the alleged trespass it was by leave and license of the plaintiff first given and granted. The plaintiff filed a replication denying the averments of this special plea.

During the trial of the case and after the defendant had introduced the testimony of one witness, he was given permission by the court to withdraw his special plea of leave and license, against the objection of the plaintiff, and the trial proceeded under the plea of the general issue.

At the close of the testimony the defendant made a motion for the direction of a verdict in his favor on the ground that the plaintiff did not have possession of the machine at the time of the trespass. The court denied this motion and its denial is the defendant's first exception.

The testimony for the plaintiff tended to prove that he was the owner of the

machine with the right of immediate possession; that he had constructive possession of it while it was in the actual possession of his brother; and that against said brother's protest the defendant took possession of the machine and sent it to Agnes Semonian. The testimony for the defendant tended to prove that the plaintiff had sold the machine to said Agnes Semonian and that the defendant, while acting as her agent and with the help of the plaintiff's said brother, sent the machine to her. Upon this conflicting evidence it would have been error for the court to have directed a verdict for the defendant for it is settled that a verdict should not be directed for the defendant if, on any reasonable view of the testimony, the plaintiff can recover. *Baynes vs. Billings*, 30 R. I. 53; *Reddington vs. Getchell*, 40 R. I. 463; especially in this case where the burden of proof was on the defendant to justify the taking. *Collier vs. Jenks*, 19 R. I. 493; *Shibley vs. Gendron*, 25 R. I. 519. The defendant's exception to the denial of his motion for the direction of a verdict is overruled.

Another exception claimed by the defendant is to the exclusion of his question, "What was the purpose of putting the store in your name?" asked of his witness, Agnes Semonian. It appeared in evidence that the witness was the purchaser of her husband's store at a mortgagee's sale of the same and that the pop-corn machine was neither mortgaged nor included in the sale. This being so, the question excluded was immaterial and irrelevant, and the exception is not tenable.

The defendant claims two exceptions to that portion of the charge relating to the legal effect of the lease of the machine by the plaintiff to his brother, where the trial justice said, "The lessee doesn't come in here and dispute the title; someone else does. And where there is a taking of this kind, a case could

have been brought either by the lessor, that is by Melkon, or by his brother. Of course both of them had a property in it. One had a general property, as it is called; one had a special property, and as long as those two don't disagree, it is proper for the lessor to bring this suit for him."

The defendant claims that it was error for the court to charge that the action could have been brought either by the lessor or the lessee. This claim of error is based upon the assumption that the lessee was in possession of the machine under a lease for a definite term when it was taken, August 7, 1917, by the defendant and sent to Agnes Semonian. This assumption is not justified by the evidence for although it appeared that the plaintiff had leased the machine to his brother, Baghdasar, February 21, 1917, for a definite term, it also appeared that in the following April the defendant took possession of it when he foreclosed the mortgage which he held upon Baghdasar's store. The lease required the lessee to take good care of the machine and not to underlet it, and gave the lessor the right to take possession of the same for breach of any condition. Soon after the defendant took the machine from the lessee, the plaintiff brought an action of replevin against the defendant to recover possession of it and April 21, 1917, the defendant signed an affidavit in which he stated that he made no claim to the machine and that the plaintiff might take judgment for it against him.

The bringing of the action of replevin by the plaintiff was an election on his part to recover possession of the machine discharged from the lease as well as from any claim of the defendant. Baghdassar Semonian never had possession of it as lessee after this time. He appeared as a witness for the plaintiff and made no claim to the machine under the lease. The machine was left

in the store of Agnes Semonian from April 27 until the following August, when it was taken therefrom by the defendant soon after he foreclosed his mortgage upon her store. She claimed that during the time the machine was in her store it belonged to her.

The vital question is whether the plaintiff (the former lessor) can maintain the action. As this court is of the opinion that he is entitled to maintain the action, that portion of the charge which was to the effect that the former lessee could also maintain the action was not prejudiced to the defendant and the defendant and the defendant's exceptions thereto are overruled.

The defendant claims that he should not be held liable as a trespasser for taking the machine because he acted only as agent for Agnes Semonian. This claim is unavailing because a trespasser cannot relieve himself from liability by showing that a third person directed, ordered or authorized him to do the illegal act complained of. *Dona-hue vs. Shippee*, 15 R. I. 453; 26 R. C. L. 962.

The defense to this action was that on April 27, 1917, the plaintiff gave Agnes Semonian a bill of sale of the machine. The defendant and two witnesses testified to this effect and the plaintiff denied that he had sold her the machine. This issue was submitted to the jury, under proper instructions, and the trial justice. As there is sufficient evidence to support the verdict, and it does not appear that the trial justice was in error in approving it, under the established rule it will not be disturbed by this court.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

For Plaintiff: Cooney & Cooney.

For Defendant: Huga A. Clason.

SUPREME COURT

Margaret Dunlavy }
 vs. } Ex.&c. No. 5460
 William Taber }

(Before Hahn, J., Below)

RESCRIPT

This is an action of trover to recover the value of some household goods and clothing. Decision was rendered in a District Court for the plaintiff and the defendant claimed a jury trial. After a trial in the Superior Court, the jury returned a verdict for the plaintiff in the sum of \$350. The defendant's motion for a new trial was then denied by the trial justice and the defendant has duly prosecuted his exceptions to this court.

Several grounds are stated in the bill of exceptions, but the only one urged by the defendant is that the trial justice erred in denying his motion for a new trial upon the grounds that the verdict was against the law and the evidence and the weight thereof.

It appears in the transcription of the evidence that the plaintiff and the defendant were at one time husband and wife, and that she procured a divorce from him. She testified that when the final separation came she left some of her clothing and a large part of her household furniture in his possession; that she subsequently demanded these articles from him; and that upon his refusal to deliver them she commenced this action.

The defendant testified that after the plaintiff had left his home she returned and obtained her clothing and offered to sell him all of her furniture and effects remaining in the house for fifty dollars, and that he immediately paid her this sum in full settlement. He denied that the plaintiff made any demand upon him for the goods in question. The

plaintiff denied that she made an agreement to sell her furniture to the defendant and also denied that he paid her the money as he testified.

The parties are corroborated, to some extent, by the testimony of other witnesses. Upon the conflicting testimony the jury was called upon to decide the questions as to the title to the goods, and whether or not a demand was made by the plaintiff upon the defendant for a return of them before the issuance of the writ. It decided these questions in favor of the plaintiff and the verdict has been approved by the trial justice.

The action of the trial justice in approving the verdict does not appear to be wrong as there is sufficient testimony to support it, and the exception to the denial of the motion for a new trial is overruled.

All of the defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

For Plaintiff: L. M. D. Champlin.

For Defendant: Cushing, Carroll & McCartin.

SUPERIOR COURT

WASHINGTON, Sc.

Asa Sweet }
 vs. } Law No. 860
 Etta Hoxsie }

DECISION

November 1, 1921.

BROWN, J. On defendant's demurrer to the declaration.

The action is brought in trespass quare clausum fregit.

The plaintiff alleges that the defendant with force and arms broke and en-

tered his close situated in South Kingstown and described as follows: "Being part of a tract of land formerly owned by Eben A. Sweet and bounded on the east by land of said defendant, north by land of or formerly of Samuel C. Adams, west by land of plaintiff and thirty-acre pond so-called, and on the south by land of R. I. State College."

The defendant has demurred to the declaration because he says, "The only definite boundary by which the land in question can be located is the westerly line of the defendant, whereas the location of the westerly line of the defendant is the question at issue before the court."

In Gould on Pleading, (6th ed.) 369, the rule is stated to be as follows: "In trespass quare clausum fregit, also the close must be described, as lying in a certain parish and county named; it is held advisable to set out also the abutments, or name of the close. In the United States, in which closes, or parcels of land, are not in general known by particular ancient names, a description by abutments, or by lines and distances, would seem generally indispensable."

In Chitty on Pleading, Vol. 1, Page No. 376, it is recognized as sufficient description in the declaration of the realty trespassed upon to refer to it as abutting on the close of the defendant.

In Ency. of Pl. and Pr., Vol. 21, p. 818, it is said: "While it is the better form of pleading to give a particular description of the close on which a trespass is alleged to have been committed unless such description is required by statute it may be omitted and the plaintiff may prove the act to have been on land in his possession, within the limits of the locality named in the writ unless the defendant by reason of the uncertain description pleads liberum tenementum with the object of compelling the plaintiff to reply by way of new assignment."

The description of the land in the case before the court is sufficient.

The demurrer is overruled.

The defendant is allowed ten days to plead.

For Plaintiff: John J. Dunn.

For Defendant: Samuel H. Davis.

SUPERIOR COURT

KENT, Sc.

Arthur Hamel, Admr.	} No. 1061
vs.	
Philip Brouillard	

DECISION

BROWN, J. On plaintiff's amended demurrer to defendant's plea in abatement.

The declaration shows that plaintiff as administrator of the estate of Roland Hamel, whose death was caused October 10, 1919, by the negligent act of the defendant, has brought this action under the provisions of Chap. 283, Sec. 14, of the General Laws of 1909, to recover damages.

The writ in this action was sued out May 18, 1921, and duly entered in the clerk's office, together with the declaration, June 1, 1921.

The defendant has pleaded in abatement of this action, alleging as ground of such abatement that the "plaintiff in his individual name for himself as beneficiary, under the provisions of Section 14 of Chapter 283 of the General Laws of 1909, sued out of the Superior Court of the State of Rhode Island, within and for the County of Kent, a prior writ, at a time when there was no executor or administrator upon the estate of said Roland Hamel, in which writ the said defendant was impleaded in an action under the provisions of said section of said chapter for the same cause as in the writ and declaration in this action

brought by the plaintiff in his capacity as administrator upon the estate of said Roland Hamel;" the defendant further avers, "that the plaintiff in the prior writ is the same person as the plaintiff in the present writ, and the defendant named in said prior writ is the same person as the defendant named in the present writ;" that the prior writ was duly entered and is now pending, etc.

To this plea the plaintiff has demurred, alleging as ground of demurrer that the prior action "is a nullity, and being so the pendency thereof is not ground for quashing the writ in the present action."

In 1 Encyclopaedia of Pl. & Pr., 766, it is said, where the prior suit is "so defective as to be ineffectual, its pendency will not abate a second suit between the same parties for the same cause of action."

The statute above mentioned, and by virtue of which alone this action could in any event be maintained, provides as follows: "If there is no executor or administrator, or if there being one, no action is brought in his name within six months after the death, one action may be brought in the names of all the beneficiaries, either by all, or by part, stating that they sue for the benefit of all, and stating their respective relations to the deceased."

As there was no executor or administrator when the prior action was brought, the plaintiff could only sue then as "beneficiary," and in bringing an action as "beneficiary," he is required to state under the statute his relation to the deceased. This is so that the court can see for itself whether he is a beneficiary, and therefore entitled to bring the action. This he failed to do. Therefore he failed to bring himself within the provisions of the statute enabling him to maintain the action.

The plaintiff's prior action, as shown

by the plea in abatement, is "so defective as to be ineffectual," and therefore is not cause of abatement of the present action.

Demurrer to the plea in abatement is sustained.

SUPERIOR COURT

WASHINGTON, Sc.

New Haven Iron & Steel Company	} Equity
vs.	
Walter J. Westlake, Collector of Taxes	} No. 178

RESCRIPT

SUMNER, J. This is a bill in equity brought by the New Haven Iron & Steel Company, a corporation, against Walter J. Westlake, Collector of Taxes, of the Town of Narragansett, alleging that the Tax Assessors of the Town of Narragansett on August 15, 1918, assessed certain buildings, termed by them "Mathewson Hotel buildings," against the complainant, and set forth a tax thereon of \$1080; that respondent had levied upon said property and was about to sell the same; that the proceedings of the respondent in connection with the attempted sale of the property were illegal and for the following reasons, namely: That said property was not lawfully described for the purpose of assessment; that there was no distraint of said property as required by law; that there was no lawful levy thereon and that said buildings were personal property at the time of said assessment and not real estate as described in the notice of sale and the assessment.

Accordingly, the complainant prays for a permanent injunction restraining respondent from attempting to sell or dispose of said property.

It appeared in evidence, that the Tax

Assessors had in the assessment roll placed the property in question, namely, "Mathewson Hotel buildings under the heading, "Buildings and Improvements," and not under the heading "Tangible Personal Property," and that upon the non-payment of the tax assessed, respondent had proceeded to levy thereon as though the property were real estate. Complainant introduced an agreement, signed and acknowledged by one Samuel Tuch and itself, wherein said Tuch conveyed the "group of buildings comprising the "Mathewson Hotel" to the complainant for the purpose of wrecking them, and giving complainant until August 30, 1919, to complete their removal from the premises. This agreement was dated July 8, 1918, and complaint claims thereunder. Complainant also introduced an agreement between the Estate of William B. Banigan (executed by Emma T. O'Connor, executrix), and said Tuch, dated June 10, 1918, wherein the Banigan estate conveys the said buildings to said Tuch for the purpose of wrecking and disposing of them, said wrecking to be completed by August 30, 1919.

Complainant's treasurer testified that the various inside fixtures were first sold at auction for its benefit and that he began to wreck the buildings about the middle of July; that at that time only the shell of the buildings remained; that the neighbors objected to the flying shingles and plastering, so that before much progress had been made he desisted, namely, about the first of August, and waited until the season was over, and completed the wrecking in the fall. It also appeared that the land upon which the buildings were situated was taxed at this time to Emma R. O'Connor, trustee, and a copy of a mortgagee's deed was introduced, showing the conveyance of this whole estate, including the land, to Emma T. O'Connor, trustee under the will of William B. Banigan, on November 30, 1917, which said deed was re-

corded December 1, 1917. A certificate of the Deputy Town Clerk of Narragansett shows that there have been no conveyances of record relative to said property since December 1, 1917.

Complainant contends that the tax was illegal, because, first: the resolution passed by the financial town meeting was not in compliance with the law; second: that the property of complainant was personal property and under the law should have been so classified and taxed, and third: that the proceedings begun by the Collector for the sale of said property were not in compliance with the law.

The first objection of the complainant is that certain clauses prescribed by Chapter 1211 of the Public Laws were not inserted in the body of the resolution passed by the financial town meeting. These clauses in substance direct the Town Clerk to deliver a copy of the assessment to the Town Treasurer, who shall issue and affix to said copy a warrant under his hand directed to the Collector of Taxes commanding him to collect the tax. As far as appears these prescribed duties were properly performed by the officials notwithstanding the lack of the directions in the vote.

The opinion in *Pendleton vs. Briggs*, 37 R. I. 352, says. "It must be borne in mind, in the consideration of these questions, that an action for the recovery of a town tax cannot be defeated by mere irregularities which do not go to the jurisdiction of the assessors or deprive the defendant of some substantial right."

The court feels that the complainant was not deprived of any substantial right by this omission.

The gist of the second and third grounds is that the property should have been assessed as personal property and levied on as such.

The question for us to consider, then, is: Were these buildings on August 15,

1918, real estate or had they been actually or constructively severed and so become personal property?

In *Lindgren vs. Doughty*, 32 R. I. 528, the court held that a building upon leased land, the lease whereof had not been recorded, was personal property and that the levy thereon as real estate was invalid. This case is different in that there is no lease and the building was at one time a part of the realty.

Cyc. Vol. 37, page 778, says: "The question whether they (buildings and improvements on real estate) are taxable as realty or personalty depends on the rules ordinarily applicable in such cases, with reference to their permanent character, the right of lessees to remove them, them, and other such tests.

Again, Cyc., Vol. 19, page 1070: "After property has become realty, it is said it may become personalty by force of agreement of parties in interest," citing *Manwaring vs. Jenison*, 61 Mich. 117, and *Madigan vs. McCarthy*, 108 Mass. 378.

Under the rule as above laid down by Cyc., the tests of whether buildings on land of another are taxable as realty or personalty are their permanent character, the right to remove them, and the agreement of the parties in interest.

This rule is also supported by *Schuchardt vs. Layor*, 53 N. Y. 202, wherein the court says: "The rule of common law that whatever is annexed to the freehold becomes a part of it may be controlled and modified by agreement between the owner and the person by whom the annexation is made. * * * The owner may reserve from a conveyance of land, trees or buildings thereon, in which case they will in contemplation of law be regarded as divided and severed from the sod and will vest as chattels in the grantor even before actual severance."

See *Corcoran vs. Webster*, 50 Wis. 125, to the same effect.

In *Poor vs. Oakman*, 104 Mass. 309, the court says: "Not only a structure but trees, grass, stone in a quarry and other things which are a part of the realty may be sold, by oral agreement, and removed by virtue of an oral license; but it is well established law that before severance the owner may revoke the sale and the license and no title will have passed to the purchaser.

* * * The ground of these decisions is that the statute of frauds requires that a sale of any interest in real estate, in order to be valid, must be in writing. In this case the owner of the land, the Estate of William B. Banigan, had by written instrument conveyed the buildings in question to Tuch and he in turn had conveyed to the complainant. Under the reason of the rule laid down in *Poor vs. Oakman*, supra., as the conveyance was in writing, an actual severance was unnecessary. If, however, a severance was necessary, as some authorities seem to imply, the fact that the interior of the buildings had been stripped and only the shell remained, and that the complainant had actually begun to tear down this shell before August 15, the date of the assessment, would seem to indicate that a constructive, if not an actual severance, had been made.

In nearly all the cases where this question has been raised there have been conflicting rights of mortgagees or creditors to be adjudicated, and for that reason the lines have been very carefully drawn. Here there is no such conflict of claims, and the court may very fairly, in weighing the evidence, be guided by the evident intention of the parties. The fact that the land was taxed to Emma T. O'Connor, trustee, and the buildings to the complainant, clearly indicates that the assessors considered that the Banigan Estate had parted with its interest in the buildings. There are no conveyances of this property in the real

estate records subsequent to the deed to Mrs. O'Connor, trustee, and we can only imagine why the assessors saw fit to tax these buildings to complainant (for the same amount that they had taxed them to Mrs. O'Connor, trustee, the preceding year), while taxing the land separately to Mrs. O'Connor, trustee.

The court believes that the assessors in placing this property in the column of "Buildings and Improvements," assessed it as real estate, and this belief is borne out by the statement of the respondent collector that he levied upon it as real estate.

The court finds that the buildings in question on August 15, 1918, by intent of the parties and by constructive or actual severance were personal property and should have been so assessed and levied upon, and that the attempt of the collector to levy upon them as real estate was invalid.

The complainant is accordingly entitled to relief.

SUPERIOR COURT

WASHINGTON, Sc.

Susan H. Graham, Executrix }
vs. }
Walter C. Nye, et al.

RESCRIPT

SUMNER, J. This is a suit of trespass on the case for the death of William F. Graham, alleged to have been caused by the negligence of the trustees under the will of James A. Foster, owners of the building in which the death occurred. The jury returned a verdict for \$5000 for the plaintiff executrix and the defendants have filed a petition for a new trial.

The only ground urged at the hearing was that the amount of the verdict was excessive.

The suit is brought by the daughter as executrix of the will of William F. Graham.

It appeared from the testimony that the decedent was aged 76 years and 9 months; that on the day in question he had been escorted by his nephew up one flight of stairs at the Imperial Apartments in the City of Providence and was told by his nephew, who then left him, that the room of his son, which was on the third floor of the apartments, was open so he could go in, and that some three hours later the body of the decedent was found at the foot of the elevator shaft.

One of the witnesses for the plaintiff testified that the elevator was standing on the second floor of the apartments that morning, not long before the accident, with the door open and a mop and brooms on the floor. It also appeared that there was no safety device to prevent the operation of the elevator while the door on that floor was open; that the hallway was lighted by gas which, according to one of the witnesses, gave a dull light; that the door of the elevator was near the flight of stairs up which the decedent intended to go; that the elevator was used by the occupants of the rooms, and that the eye-sight of the decedent was impaired.

The decedent was a harness maker, working in a small shop on the estate in South Kingstown, where he lived, which was owned by his wife and in which he had a life interest. His daughter testified that he kept no books, but claims she was familiar with his business affairs and estimated his net earnings as \$25 a week. He had an invalid wife, who required waiting on, and three daughters living with him. Two of the daughters paid \$5 each a week for board; the other daughter acted as housekeeper and attendant upon his wife and received \$5 a week for her services.

The decedent apparently used up his

entire income. The daughter estimated the expenses of her father for church, Lodge of Masons, Odd Fellows and clothing at \$45 a year.

Plaintiff's attorney estimates the item of food for decedent at \$156 and his share of the services rendered by the paid daughter as worth \$104, then adds the above sum of \$45, making a total of \$305, and argues that if the jury allowed a balance of \$97 to take care of the deceased's proportionate share of repairs, insurance and taxes in lieu of the rent, making an annual net income of \$898, the verdict of the jury was justified.

This argument fails to take into account the fact that though a man of 76 years and 9 months might, under the Expectancy of Life Tables, live for perhaps six years, his earning capacity would be apt to be considerably reduced before the expiration of that period, especially as his eye-sight was so impaired that he had been treated by an oculist.

In the absence of any definite figures as to the household expenses of the decedent, as to the rental value of the premises which he occupied, or as to the amount paid by him for taxes, repairs and insurance, the amount to be deducted from his income in order to pay for his support is somewhat conjectural.

The attorney for the defendant also submitted some figures. He added to Mr. Graham's weekly earnings of \$25 the \$10 contributed by his two daughters and \$5 for the weekly rental value of the house, making a total weekly receipt of \$40. One-fifth of that amount, or \$8, he estimates as Mr. Graham's personal expenses, adds \$1 a week to take care of the church and other dues and clothing, underwear, etc., and then adds \$2 more for the weekly rental value of the workshop, making a total of \$11. Deducting the \$11 weekly expenses of the

producer from the net \$25 weekly income received, he shows a balance of \$14 as the net weekly earnings available for deceased's estate without any allowance for doctor's bills or pocket money. Then multiplying the value of \$1 income per annum for six years at five per cent, namely, \$5,0757, by an income of \$728, he gets a total of \$3895.11. Assuming, however, what perhaps is fairer, that his net earnings available for his estate are \$15 a week, with an expectancy of life of six years, we would have, at five per cent., a total of \$3,959.04. Both of these figures, however, take no account of diminished earnings due to increasing years.

The court thinks that the verdict of \$5000 is excessive and that the sum of \$3500 would more accurately represent the loss accruing to the plaintiff, and it accordingly grants the petition of the defendants for a new trial unless the plaintiff shall, in writing, within 10 days of the filing of this rescript, remit all of the verdict in excess of \$3500.

SUPERIOR COURT

NEWPORT, Sc.

Apostolos B. Cascambas

vs.

Receivers of Rhode
Island Company

Law

No. 2993

RESCRIPT

BARROWS, J. Heard on defendant's motion for a new trial based upon the usual grounds.

The verdict of the jury in favor of plaintiff assessed damages at \$874.20 for defendant's negligence.

The amount of damages was undisputed and the most that can be allowed would be \$824.20. The item of \$850

originally claimed went into evidence at a sum not exceeding \$600.

The other questions in the case seem to us to have been questions of fact for the jury and the court sees no reason to disturb them.

The evidence was conflicting as to whether plaintiff's agent, Matthews, driving plaintiff's Ford truck immediately before the accident was approaching the car in the track or outside of it. The motorman, who testified that his eyes were straight ahead all the time and that he saw Matthews approaching a long way down the road, says he was first inside at some distance away, then turned outside, and as he neared the car suddenly swerved in again too late to avoid the accident. On cross-examination he said, "It looked dangerous to me, the way he was coming." Other witnesses say that the truck was approaching the car with one wheel inside the track and evidently trying to turn out of a gulley alongside the track. There was no testimony of excessive speed on the part of plaintiff or defendant. Evidently, the jury accepted the version of those witnesses who said that plaintiff was caught in the rut and was endeavoring to turn out, and either of those other witnesses who said that the motorman's attention was turned to people coming out of a moving picture show and was elsewhere than on the road in front of him, or that he saw plaintiff's danger and failed to take steps to avoid the accident.

On the evidence we felt compelled to submit to the jury the question of whether Matthew's danger was seen by the motorman, and whether the latter reasonably proceeded, if he did see the plaintiff's plight, in the expectation that the truck would get out of the rut and off the track in time to avoid the collision. The conflict of evidence as to the

course taken by the truck just prior to the collision and the motorman's testimony as to where he was looking and that plaintiff's course looked dangerous to him, in our opinion necessitated an instruction on the last clear chance and distinguished the case from the Halliday case, 107 Atl. Rep. 86. If the court erred in permitting the jury to consider whether the defendant had the last clear chance, it was an error of law and defendants' rights were protected by exception to the charge in this respect. Matters of law can not be corrected in this court on motion for new trial. The case was one where the jury on the evidence might have found either way and we see no reason to interfere with the verdict except on the question of damages.

Unless the plaintiff shall remit \$50 of his damages prior to October 20, 1921, a new trial will be granted; otherwise defendants' motion for a new trial is denied.

SUPERIOR COURT

KENT, Sc.

City of Providence
For the Benefit of
Pierre Michaud
vs.
Victor Lawrence
et al.

RESCRIPT

BARROWS, J. Heard on second ground of demurrer to the declaration.

The suit is on a jitney bond given to the City of Providence. The accident occurred in the city of Cranston. The demurrer is based upon this ground and seems to us should be sustained.

Demurrer sustained.

SUPERIOR COURT

NEWPORT, Sc.

State	}	Ind. No. 1810
vs.		
Lucinda Scott		

RESCRIPT

January 7, 1922

BARROWS, J. Heard on motion for a new trial after verdict of guilty on an indictment alleging the keeping of a nuisance.

The grounds for a new trial are that the verdict is against the law and the evidence and an additional grounds as follows: "Because after the jury was impanelled William A. Peckham, of the office of Burdick & MacLeod, became associated with the Attorney General's department in the prosecution of the State's case, and the said William Peckham is related to the foreman of the jury, to the prejudice of said defendant."

The fifth ground, which makes a similar charge in regard to other members of the jury, was abandoned at the hearing.

The parties are agreed that the relationship referred to above was that an uncle of Mr. Peckham was named Rogers, and that the wife of said uncle was an aunt of the foreman of the jury. No blood relationship existed nor was any claim made of intimacy or close association, or that the parties realized any so-called relationship between the foreman and Mr. Peckham. It was a fact that Mr. Peckham sat in with Mr. Make-

peace on the second day of the trial, taking notes, but in no other way participated in the trial of the case during that or any succeeding day.

Defendant claims that she first learned of the so-called relationship on the day after the verdict was rendered.

The relationship is so remote that we see no reason for believing that the foreman was improperly influenced by the circumstances.

On the ground that the verdict was against the evidence, defendant calls our attention to the fact that the police had not made an arrest of any one at the Scott house prior to the time of the raid involved in the present trial, and asks us to believe that the house could not have been a disorderly place during the several months that were covered by the testimony. Such conclusion by no means follows. When and under what circumstances the police deem it advisable to take proceedings against a disorderly establishment is a matter which must be left to them, and the fact that they had not acted hitherto can in no sense be urged in proof of the alleged fact that no illegal situation existed.

Counsel for defendant also produced the affidavit of one of the jurors named Gadsby, in which he said that he voted continuously for the innocence of the woman until such time as the jury was called in for further instructions, and that thereafter he changed his vote under the influence of the court's further instruction, although he still believed the woman to be innocent.

In reply to this affidavit it may be suggested, first, that it is no proper ground for a motion for a new trial, nor does it appear as such ground in the motion, and there is nothing to indicate the slightest impropriety in the jury room. If there was error in the further instructions given to the jury by the

court, it was error of law and is not reversible on the present motion. It should further be noted that the jury was polled on motion of counsel for defendant. Exceptions were taken to the further instructions, as will appear on record. The jury was amply justified on the evidence in finding a verdict of guilty and any other result would have been a miscarriage of justice.

Motion for new trial is denied.

SUPERIOR COURT

NEWPORT, Sc.

Mrs. John Rosso

vs.

Angela Dimauro Gianfrido,
alias

No. 3083

RESCRIPT

BARROWS, J. Heard on demurrer to the declaration.

The declaration is based upon alleged slanderous words per se. It is in three counts.

The language used by the utterer was Italian and the translation and innuendo of said language as appearing in the declaration is, in the first count, that "Anna Dimauro (another Italian) brought Nauzurella Rosso (the plaintiff) as far as the place that Rosario Dimodica (a male Italian) works for prostitute affairs (meaning that the plaintiff had committed adultery);" in the second and third counts that "she (Nauzurella Rosso, the plaintiff,) went out for the purpose of prostitution (meaning that the plaintiff had committed adultery)."

The demurrer is based upon the grounds:

First: That there is no English translation of the Italian language used; which is incorrect, as appeared at the argument of the case.

Second. That there is nothing in said language to warrant persons who heard the publication of the same in believing that the plaintiff had been guilty of adultery; and

Third. On account of vagueness and ambiguity.

The first and third grounds of the demurrer are not well taken. The only real question relates to the second ground.

The defendant argues that there is no reasonable ground for claiming that a married woman is charged with having committed adultery because someone says she has been taken to a house of prostitution or taken out for the purposes of prostitution.

It seems to us that the situation is much like that in *Sturtevant vs. Root*, 27 N. H. 69, where the court held that language saying that a married woman went into a bed room with a man not her husband was actionable as imputing adultery if there was a sufficient colloquium to warrant the hearers in accepting that view of the situation.

The case of *Black vs Smith*, 19 R. I. at 480, appears to us to be substantially to the same effect.

"It is not necessary that the defendant in so many words should expressly state that the plaintiff has committed a particular crime or offence. * * * But, if the crime or offence be imputed in the ordinary language employed to denote it in lay conversation and in such a way that the bystanders clearly understand that the plaintiff is thereby charged with the commission of the offence, it is sufficient."

The demurrer to the declaration is therefore overruled.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 28

APRIL 14, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Supreme Court Calendar

MONDAY, APRIL 17, 1922

Ex5611 E C S	Rocco Peretta & Co. vs Ventrone & Co., Inc.	P & D
Ex5621 G F T	Adelard Malo vs S. Goldenberg	C R E
Ex5622 G F T	T. Maguire, p. a. vs S. Goldenberg	C R E
Ex5479 Atty. Gen.	State vs Errico Romano	P & D
Ex5559 G M & H	E. A. Stevenson & Co., Inc. vs A. F. Cappelli	W C & C
MP 375 W & G	Frederick A. Stevens vs Superior Court.	

WEDNESDAY, APRIL 19, 1922

Ex5554 HMB-JPB	F. E. Sullivan vs Hope Publishing Company	F & H
Ex5613 B W G	F. Carto vs V. J. Ferri	P & D
Ex5607 DCA-R&R	M. Granstein vs M. Rosenstein	J H C

FRIDAY, APRIL 21, 1922

Ex5563 E C S	Maderight Mfg. Co. vs Max Charren	R & R
Ex5578 LSW-A G	R. W. Jennings vs U. S. Bobbin & Shuttle Co.	F A J
Ex5608 J F C	F. A. Decker & Co. vs W. J. Donovan	F & M
Ex5579 W & G	Jennie F. Congdon vs Louis H. Block	C & C

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, APRIL 17, 1922

Eq5690 Cooney & C	J. D'Arcy et al. vs D. D. F. Metivies	
52817 C S S	G. H. Bates vs J. H. Dillan	T J D-S
Pet.339 J M S	R. S. Simmons vs J. Samuels & Bro., Inc.	Gunning
Pet.337 Q & K	Nancy Simmons vs J. Samuels & Bro., Inc.	Gunning

TUESDAY, APRIL 18, 1922

Eq5772 G E & C	H. E. Edwards vs Nornay Worstod Company	
Eq5694 Bennett	R. Y. Scott vs Grace D. Knight	Q & K

WEDNESDAY, APRIL 19, 1922

Eq5777 S K & S	Margaretha Ginand vs Emma Ginand et al.	
52509 Champlin	A. Pente et al. vs A. Mercurio	C R E
52096 G H & A	Mex. Petrol. Corp. vs Philips Wire Co. (Barrows, J.)	T & C
Eq5744 L & McC	Roy F. Wilkins vs Frank B. Wilkins	
Eq5785 Brand	Louis Anfieri et al. vs B. Leitner et al.	Gorman

Jury Trial Calendar

MONDAY, APRIL 24, 1922

46615 McSoley	Clara Santagata, p. a. vs Joseph H. Ducharme	A & A
46616 McSoley	Luigi Santagata vs Joseph H. Ducharme	A & A
43559 R & R	City of Providence vs Myer Epstein et al.	Q & K
43560 R & R	City of Providence vs Myer Epstein et al.	Q & K
51384 G H & A	Robt. J. F. Schwarzenbach vs Mer. T. & T. H., Inc.	B & B
51498 F & H	Alfred Messier vs John E. Pugh	

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51911 E C S	Briggs Eng. Co. vs Avice W. Borda	T & C
48681 P & DeP	James Weisman vs Joseph Bedard	P E D
47151 O L-W & G	William S. White vs King Braiding Machine Co.	W H McS
50966 C & C	Mary Eaton vs George Tattersall	F & H
49886 C & Cooney	John J. Fitzgerald vs Joseph Mullen	F & M
51757 P & DeP	Salvatore Ottiano vs Royal Ins. Co., Ltd.	Jackvony

TUESDAY, APRIL 25, 1922

51398 W M P B	Leo Kriechbaum vs Talty Brothers	C C & McC
51437 W A G	John Walton vs Charles F. H. Alvey	P & S
34422 B & C	Margaret T. Driver vs Henry F. McCaffrey	J F M
49612 B & B	David Korn vs Harold B. Congdon	W A G
50622 F & H	Grace A. Stearns vs Joseph Vieira	
51756 M & T	Oversear Corp. vs K. K. Novetly Corp.	McG & S
50775 L V J	Antonio Fern vs Nicola De Corpo	B C
52210 A & A	Henry A. Jacob vs Albert Lafamme et als.	C & C
52317 S-M-B	B. F. Goodrich Rubber Co. vs F. A. Decker Co.	J T C
49365 S-M-B	Eagle Cornice Co. vs Vincenzo J. Oddo	P & DeP
48914 J V-B	Helen Fairbanks vs Thomas McGrath	C C & McC
52682 J E B	J. Andrews et al. vs Sabestyan Szczepanek et al.	P E D
50479 J E B	Alfred Del Pape vs Albert Giusti	P & DeP
50164 Gallagher	Baird-North Co. vs Herman Wonderlich	S S B
52096 G H & A	Mexican Petroleum Corp. vs Phillips Wire Co.	T & C

WEDNESDAY, APRIL 26, 1922

46836 F & H	Giuseppe D'Elie vs Fred M. Swartz	R & R
51487 D A Colton	Bernard Murtha vs Earl E. Townsend	Q & K
50959 P & DeP	Filicia Caranci vs Antonio Passarelli	L V J
51910 S K & S	Frederic R. Harris vs William M. Harris, Jr.	H E & M
52007 E C Stiness	Continental Rubber Wks. vs Millers, Inc.	Wildes
50722 O'S G & C	Mary E. Sullivan vs The Texan Company	H E & M

50721 O'S G & C	Dennis J. Sullivan vs The Texan Company	H E & M
52277 Coen	Sebastiano Cavallaro et al. vs Giovanni Bacchia	E L J
51370 J V	City of Providence vs James Pearson et al.	B & C
51482 C & C	Frank Mossberg Co. vs Frank Mossberg	H C C
51532 O'S & C	Max M. Pullman vs United Electric Ry. Co.	C W
52532 GJS-SWF Jr	John Silverman vs Morris Saperstein	S J J
52957 C & Cooney	Mary J. Guerin vs Herbert C. Talbott, Exr.	

THURSDAY, APRIL 27, 1922

44836 W M P B	Thomas H. Kearns vs William M. Lannan	J E D
48205 G H & A	Daniel McNally vs Robert E. Budlong	L B & McC
52698 R & R	Max Shore vs Hyman Weinberg	S & S
51883 C & DeS	Angelina Colando vs Concetta Martucci	V
49151 Q & K	Emma Freethy vs Oscar Schonhardt et al.	F & H
51631 J Harris-B	Georgianna Testa vs John F. McGair	F & H
52189 J C S	Antone Rebello vs Isadore Gaudoit	F & M
52190 J C S	Mabel Robello vs Isadore Gaudoit	F & M
52332 B & B	David H. Slavitt vs Manuel Fratus et al.	C & C
51769 J A E	Manuel Peters vs George Hiller	P & S
49198 E C S-M	Feris Karam vs Mrs. Gardner Easton	S & H
50413 B & B	Union Mills vs Leo Glass et als.	I M
52801 T J McG	George Kasparian vs United Electric Ry. Co.	C W-S

FRIDAY, APRIL 28, 1922

51413 Ziegler-K	Joseph E. Arge vs Martha V. Brown	S & L
51687 Sullivan-S	Hyman Weinberg vs Max Shore	R & R
51863 West	James E. Beagan vs Automobile Ins. Co., Hartford	G H & A
50747 Dorney	Arnold H. Heilbron vs Olney & Payne Bros. Inc.	R T B
45264 P & DeP	Giovanni Geremia vs Frank Tarplianetti	B C
45265 P & DeP	Angela Geremia vs Frank Tarplianetti	B C
45266 P & DeP	Edith Geremia, p. a. vs Frank Tarplianetti	B C
52026 R & Hagan	John N. St. John vs Thomas J. Bowen	F & H
52122 E C S	Charles E. Ruff & Son vs J. H. Preston	G H & A
45786 F & H	Frank D. Hopkins vs Leo A. Bouvier	C N W
45787 F & H	Nelson Hopkins vs Leo A. Bouvier	C N W
44166 C & C	Bagledacar Semonian vs James Panoraz	G K & G-C
50494 R & R	Joseph Scheck vs National Amusement Realty Co.	B & Walsh

SUPREME COURT

Northway Motor Sales
Company
vs. Ex. &c. No. 5581

John E. Pugh

RESCRIPT

(Before Sumner, J., Below)

This an action of trover to recover the value of a speed wagon alleged to belong to the plaintiff. After verdict for the plaintiff, the defendant's motion for a new trial was denied by the trial justice and the defendant then duly prosecuted his exceptions to this court.

It appears from the evidence that Feb.

2, 1920, the plaintiff made a written proposal to sell to H. L. Baker a motor truck and to take in payment therefore a speed wagon owned by him to be delivered at once at the agreed value of \$1000, and the balance of the price of the truck was to be paid in twelve equal monthly payments after its delivery and delivery was to be made on or about Feb. 12. Mr. Baker accepted the proposal and Feb. 3 delivered his speed wagon to the agent of the plaintiff, who took actual possession of the same. Mr. Baker then signed a paper stating that he had sold to the plaintiff his speed wagon in good-running order, appraised at \$1000, to be delivered at this time. The paper also stated that he was to have the use of the speed wagon until

the truck was delivered to him, for which immediately took the speed wagon, used it for a short time, and then, without the he was to pay \$25 per week. Mr. Baker knowledge or consent of the plaintiff, turned it over to the defendant.

The defense was that the plaintiff did not deliver the truck to Mr. Baker at the time agreed upon for its delivery and consequently he had the right to rescind his contract to purchase the truck and repossess himself of the speed wagon he had delivered to the plaintiff in part payment for the truck; and that, having repossessed himself of his speed wagon, he then had the right to, and did, deliver it to the defendant as part payment for a truck which he had purchased from the defendant.

The plaintiff claimed that Mr. Baker delivered the speed wagon to the defendant, Feb. 12 or 13, and that he was not justified in rescinding his contract to purchase the truck at that time on account of any delay in making delivery of it to him.

The defendant admitted that he received the speed wagon from Mr. Baker about the first of March, 1920, but a letter, dated Feb. 13, 1920, from the attorney of the plaintiff to the defendant, demanding its return, proves that the defendant had received it before the time admitted by him.

The jury returned a verdict for the plaintiff in the sum of \$1100 and the defendant states in his brief that he finds no fault with the amount of the verdict if he is liable for the conversion of the speed wagon.

An exception is claimed to the action of the trial justice in ordering the answer of Mr. Baker to the following question stricken out: "Before signing the paper did you receive any money for signing the agreement?" The plaintiff's written proposal to sell a truck to Mr. Baker and accepted by him contains a clause making an allowance of \$1000 for

fied that he sold Mr. Baker a truck and took his speed wagon on allowance of his speed wagon. Plaintiff's agent testified \$1000. The plaintiff did not claim that it had paid Mr. Baker any money for his speed wagon. This question objected to related to an immaterial matter and the answer thereto was properly excluded.

Another exception is to the exclusion of a question asked of Mr. Baker: "How long did you expect to hire that truck for?" This question was properly excluded because it did not appear that the witness had stated to the plaintiff's agent the length of time he expected to hire the truck.

Another exception is to the exclusion of a question asked of Mr. Baker: "Before signing that paper what kind of an understanding did you have with the agent of the sales company who requested you to sign?" This question was properly excluded as the prior negotiations are presumed to have been merged in the written contract.

The defendant claims an exception to the refusal of the court to charge as requested. An examination of the general charge shows that the three requests of the defendant were substantially included in the general charge and therefore this exception is without merit. *McGowan vs. Probate Court of Newport*, 27 R. I. 394.

Exception is also claimed to the denial of the defendant's motion for a new trial on the ground that the verdict is against the weight of the evidence. The defendant admitted that he received the speed wagon from Mr. Baker, but could not tell the exact date that he received it. Mr. Baker testified that he talked with the defendant Feb. 12 or 13 about getting a truck from him if the plaintiff's truck was not delivered, and he also testified that he traded the speed wagon with the defendant for a truck. The plaintiff's attorney testified that Baker told him that the defendant took

possession of the speed wagon before February 12. Under the proposal the truck was to be delivered by the plaintiff "on or about Feb. 12" and the court, at the request of the defendant, charged the jury that if the plaintiff unreasonably delayed the delivery of the truck to Baker, he had the right to repudiate the contract and the speed wagon would revert to him; that it was for the jury to say, in the circumstances as shown by the evidence, whether the plaintiff had been guilty of such unreasonable delay in making the delivery of the truck as would justify Baker in rescinding the contract to purchase it; and that if they found this to be the fact, the defendant would be entitled to their verdict. By its verdict the jury found against the defendant on this important issue and the verdict has been approved by the trial justice. The action of the trial justice in approving the verdict is supported by the evidence and the exception to his denial of the motion for a new trial is overruled.

All of the defendant's exceptions are overruled and the case remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

For Plaintiff: Flynn & Mahoney.

For Defendant:: Quinn & Kernan.

SUPREME COURT

Elizabeth C. Grant

vs.

James S. Grant

} Ex. &c. No. 5590

OPINION

(Before Blodget, J., Below)

STEARNS, J. This is a petition for divorce for neglect to provide and extreme cruelty. At the hearing in the Superior Court petitioner did not press

the charge of neglect to provide. The petition was granted on the ground of extreme cruelty. To this decision exception was duly taken by respondent and the cause is here on his bill of exceptions.

Some other exceptions were taken to certain rulings of the trial justice, but they are unimportant and require no special mention.

The question is, Was the decision of the trial justice clearly erroneous? Sayles vs. Sayles, 41 R. I. 171. The petitioner is a woman of middle age, who, prior to her marriage, had been a teacher in a city high school for some eighteen or nineteen years. The respondent is an electrical contractor, who does electric wiring, etc., in houses and other buildings. A part of his work was manual labor, which at times of necessity resulted in covering his clothes and body with dirt. Prior to their marriage the parties had known each other for several years, during which period, although no actual engagement existed, they had been looking forward to a marriage eventually. On several occasions they came to the conclusion that they were unsuited to each other, and for a time the intimacy ceased, only to be renewed again and finally they were married. On the evening of their wedding day they went to from Providence to Boston, at which latter city they started from the railroad station to walk to a hotel. After walking a considerable distance, with their bags in their hands, petitioner complained of being tired and suggested that a taxi cab should have been secured. Thereupon respondent dropped the bags he was carrying to the sidewalk, became enraged and upbraided his wife so noisily and so long as to attract the attention of the passersby. His wife was terrified and humiliated by his conduct and upon their return to Providence, several days later, she was in a highly nervous condition and ill as a result of

the fear with which her husband had inspired her. The respondent never struck her or threatened to strike her. On several occasions, because of his inability to find immediately some article in the house he wished to use, he broke out into violent and loud complaints which were heard by people outside of the house. Respondent says that he has no charge to make against his wife except in regard to her extreme particularity, as he calls it, in regard to his table manners, his clothes and his personal cleanliness. Petitioner and other witnesses testify that respondent at times often used profane language to his wife and in her presence. Respondent denies this charge. He does not claim that the other charges of his wife are false, but says they are grossly exaggerated. He apparently resented the attempt of his wife to induce him to conform to some of the elementary and fundamental usages of civilized society. He refused to change his underwear for long periods or to bathe, although his work was of such a nature as to cause him to perspire freely, with the result that his wife was at times nauseated by the odors emanating from his person. He claimed that he did take a number of baths, but did this secretly and without the knowledge of his wife. His reason for thus acting was that his wife annoyed him by her frequent attempts to induce him to take baths. He persisted in his conduct, although he knew that his wife was greatly disturbed and distressed thereby. He refused to change his working clothes before sitting down to supper, apparently intending thus to offend his wife. He refused to speak to friends of his wife whom she had invited to supper. In various other ways he often took the trouble to do things which had no other apparent object save to annoy and humiliate his wife before her friends and relatives. The aged father and mother of petition-

er lived in the second story of the same house. At one time during the winter, after petitioner and respondent had quarreled, respondent shut off the common heating plant in the cellar of the house, to the great inconvenience and suffering of petitioner's parents. Without further statement of the sordid details of this unhappy family life, we think certain conclusions are clearly to be drawn from the testimony.

Respondent's standards of decency and propriety differed from those of his wife. She was a woman of some refinement. Her standards of living were not unreasonable or different from the prevailing standards. He wilfully and designedly pursued a course of conduct, both in public and private, which was calculated to an actually did distress and humiliate his wife, not once, but repeatedly. Petitioner testifies that she became ill as a result of this conduct. Respondent claims that her illness was due to the influenza. Whatever be the fact, we think the inevitable result of the continuance of such conduct on the part of the respondent would be injurious to the health of his wife. The respondent has evidently a peculiar and unfortunate disposition, in which obstinacy and self-will are prominent parts. His wife was aware of some of his peculiarities before the marriage, and she can not now justly complain of such peculiarities, either of character or conduct, which although unpleasant and disagreeable, do not constitute a statutory ground of divorce. The respondent's acts were not the natural expressions of his idiosyncrasies, but were designed to cause distress to his wife with the expectation, apparently, that respondent would thereby be able to coerce his wife and compel her to live and to act in every way according to his wish and will. By his own wrongful acts the respondent created a situation where it was impossible for petitioner to continue to live with him

without real and serious danger to her health.

The courts, wisely as we think, generally have been reluctant to attempt to make any precise legal definition of "extreme cruelty" or "cruelty." Similar acts or conduct, in different circumstances may or may not amount to cruelty. Much depends on the intention of the parties, the results which follow, the habits and customs which are common to the husband and wife. Without then attempting to formulate a definition, which will cover all conceivable cases, we think the evidence in this case is sufficient to support the finding of the trial justice that respondent was guilty of extreme cruelty.

A second question remains: Was there a condonation by the wife? The parties only lived together five or six months. After the first separation petitioner and respondent attempted to live together again and marital relations were resumed. Respondent's conduct, however, was unchanged and petitioner left him. In the circumstances we do not think that the resumption of marital relations was a condonation of respondent's offence which bars petitioner's right as a wife to bear with her husband so long as there is any hope of his amendment. Such forgiveness or condonation is conditional, however, and it is forfeited by further misconduct and in cases of cruelty "treatment much less cruel than would be necessary to be a good ground for divorce will suffice to avoid the defence of condonation." See also *Egidi vs. Egidi*, 37 R. I. 481; *Sayles vs Sayles*, *supra*.

All of the respondent's exceptions are overruled and the case is remitted to the Superior Court for further proceedings.

For Petitioner: Fitzgerald & Higgins.

For Respondent: Curtis, Matteson, Boss & Letts.

SUPREME COURT

Wilhelmina Roy

vs.

Levi J. Roy

Ex. &c. No. 5570

RESCRIPT

In accordance with the opinion of this court, rendered March 24, 1922, the petitioner has been given opportunity to show cause why an order should not be made remitting the case to the Superior Court with direction to dismiss the petition.

The petitioner has now appeared by counsel in accordance with the permission given her. Having previously filed in this court a motion to amend her petition, she now asks that the same may be amended by adding the following grounds: "(a) That the said respondent hath been guilty of extreme cruelty towards your petitioner; (b) That said respondent, Levi J. Roy, has attempted to procure a divorce from your petitioner on two separate occasions, both of which petitions were based on false and fraudulent grounds, and both petitions were upon hearing on the merits thereof denied by the Superior Court; (c) And also that the said respondent, Levi J. Roy, attempted to procure false testimony against the said petitioner, by procuring one, Cotelles, to enter her home on Clifford street, Providence, which incident was the basis of the petition for divorce by the said Levi J. Roy against the present petitioner; (d) And also that on the 26th day of January, 1920, the said Levi J. Roy again attempted to procure false testimony against the said petitioner by procuring one, Laujeunesse, to enter her home on Hanover street, Providence, in an endeavor, either to form a basis for another action or to defeat the present action."

The case came to this court upon the exceptions of the respondent to the de-

cision of the trial court granting the petitioner a divorce from bed and board on the ground that the respondent, being of sufficient ability, had neglected and refused to furnish the petitioner with the necessities of life, etc.

This court is without jurisdiction and cannot entertain the motion of the petitioner to amend her petition in the manner which she sets forth. Such an amendment would practically amount to the substitution of a new petition and on different grounds from the one which has been submitted to us for consideration upon the respondent's exceptions.

The petitioner's motion to amend is denied and dismissed and it is ordered that the case be remitted to the Superior Court with direction to dismiss the petition.

SUPREME COURT

Carrie Golden
vs.
R. L. Greene Paper Co. } Ex. &c. No. 5379

OPINION

(Before Doran, J., Below)

SWEETLAND, C. J. This is an action of trespass on the case to recover damages for personal injuries alleged to have resulted from the negligence of the defendant's servant.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff in the sum of \$8500. The defendant duly filed its motion for a new trial. On this motion said justice decided that the damages awarded were excessive and that he would grant the motion unless the plaintiff should remit all of said verdict in excess of \$6000. The case is before us upon the exception of each party to the decision of said justice.

It appears that the plaintiff while walking along the sidewalk on Broad street, Providence, on the day when she received the injuries of which she complains, stopped at what is known as Jencks Alley to permit a delivery truck of the defendant to cross the sidewalk and enter said alley. While said truck was crossing the sidewalk a roll of corrugated paper fell from the side of the truck and struck the plaintiff. Said roll was thirty-six inches long, twenty-five inches in diameter and weighed seventy pounds. It further appears that the top of the sideboards of the truck was fourteen inches above its floor, and that attached to the top of each sideboard was a so-called "bill" or shelf, nine inches wide, extending outward and slightly upward from the top of the sideboard. At the time in question the body of said truck, between the sideboards, was loaded with packages and rolls of paper, and four rolls of corrugated paper were placed upon the "bill" on either side of the truck. Each roll stood on end leaning slightly inward against the merchandise in the body of the truck. As the "bill" was nine inches wide and each roll was twenty-five inches in diameter a considerable portion of the bottom of each roll overhung the outer edge of the "bill." When the truck was loaded, each roll standing on the "bill" was secured solely by a rope attached to a hook in the body of the truck under the roll, which rope passed up and over the top of the roll, thence across the truck and over the top of the roll standing on the "bill" on the other side of the truck and thence downward where it was drawn taut and attached to another hook in the body of the truck. The plan of this method was to secure each roll by pressing and holding it firmly against the merchandise in the body of the truck. It is apparent that any shifting of the merchandise in the body of the truck would tend to slacken the rope over the

top of the two rolls opposite each other, that the jar of the truck in passing over inequalities in the road would tend to shake a roll out from under the rope which bore only upon the outer edge of the top of the roll, and that a roll, if freed from the restraint of the rope, and standing nearly upright on the narrow outer shelf of the truck would be likely to fall from the truck when it was in motion. It was one of the rolls which had been standing on the "bill" that fell off and struck the plaintiff.

The plaintiff made the following allegations of negligence in her declaration: "The defendant, its agents and servants so carelessly and negligently managed, controlled and operated said automobile and transported said merchandise that a roll of paper fell off said truck and struck said plaintiff in the abdominal region with great force and violence while she was walking along said sidewalk and in the exercise of due care."

One of the defendant's grounds for new trial set out in its motion is as follows: "Second, because the evidence fails to show that the defendant was guilty of the alleged negligence." Relying upon that ground the defendant urged before said justice in support of its motion and has urged here upon its exception to the decision of said justice that the evidence would not warrant a finding that the fall of the roll of paper which struck the plaintiff was the result of any act of the defendant's servant in managing, controlling or operating said motor truck or in transporting said roll. The defendant does not admit that the evidence showed negligence on its part in loading the truck, but it contends that if there was any evidence tending to show a lack of care on its part it was in the manner of loading said truck and not in the manner of transporting said roll of paper as is alleged in the declaration. We cannot sus-

tain this position of the defendant. If it might properly be found that there was a lack of care in loading said truck at the defendant's warehouse, such negligence would not be the proximate cause of the plaintiff's injuries. The defendant's negligence towards the plaintiff, if it was guilty of any, was in carrying said roll of paper along the public streets and particularly across the sidewalk in front of the plaintiff so insecurely placed upon the truck that it was likely at any time to fall therefrom. If the jury might properly find the defendant negligent in this regard then the evidence may be regarded as tending to support the allegations of the declaration that "the defendant, its agents, and servants, so carelessly and negligently transported said merchandise that a roll of paper fell off said truck and struck said plaintiff." The defendant did not by demurrer or otherwise before trial object to the allegations of the declaration for uncertainty and if there is indefiniteness in the allegations of negligence such defect would be cured by the verdict. We think, however, as the merchandise on the truck was in the exclusive control of the defendant and the manner in which it was being transported was within the knowledge of the defendant but unknown to the plaintiff and as the accident is one that does not ordinarily happen when due care is used the plaintiff in setting out the circumstances and the happening of the accident has stated a case with reasonable certainty.

We would not disturb the jury's verdict, approved by said justice, if the amount of the damages awarded appeared to us to be just. Upon an examination of the evidence we think said justice was warranted in his decision that the damages awarded to the plaintiff was excessive.

It appears that several months after the accident the plaintiff was operated

upon surgically to correct conditions existing in her organs of reproduction. As to whether or not such conditions resulted from the accident the testimony of the expert medical witnesses is conflicting. There was evidence from which the jury might find, as appears to be the opinion of said justice, that although said condition existed in some degree before the accident her injuries arising from the accident aggravated that condition and rendered the operation necessary. On the basis of that conclusion damages may be awarded to the plaintiff fairly. After deliberation we are of the opinion, however, that even the amount of damages fixed upon by said justice in his decision is largely in excess of what would be liberal compensation for the injuries received by the plaintiff and the pain and suffering to which she was subjected as a result of the accident. We have fixed upon four thousand dollars as a just amount.

The plaintiff's exception is overruled. The defendant's exception to the decision of said justice upon the motion for new trial is sustained. The other exceptions of the defendant are overruled. The case is remitted to the Superior Court for a new trial unless on or before April 18, 1922, the plaintiff files in the office of the clerk of the Superior Court for the counties of Providence and Bristol a remittitur of all of said verdict in excess of four thousand dollars. If such remittitur is filed, the Superior Court is directed to enter judgment for the plaintiff in the sum of four thousand dollars.

For Plaintiff: S. S. Bromson and J. J. Nolan.

For Defendant: R. T. Barnefield and Pirce & Sherwood.

SUPREME COURT

Louis R. Golden
vs.
R. L. Greene Paper Co. } Ex. &c. No 5378

OPINION

(Before Doran, J., Below.)

SWEETLAND, C. J. This is an action of trespass on the case to recover damages for injuries to the plaintiff's right of consortium in consequence of personal injuries alleged to have been received by his wife through the negligence of the defendant's servant.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff in the sum of four thousand two hundred and fifty dollars. The defendant duly filed its motion for new trial, which was denied by said justice. The case is before us upon the defendant's exception to the decision of said justice upon its motion for new trial.

The alleged negligence of the defendant resulting in injuries to the plaintiff's wife has been considered in our opinion rendered in the case of Carrie Golden vs. R. L. Greene Paper Company., 44 R. I. The jury's verdict in this case, supported by the decision of the said justice, would not be disturbed by us if we did not consider the damages awarded to be excessive. The plaintiff testified to a money loss up to the time of trial of nine hundred and fifty-nine dollars, resulting from his wife's condition due to the accident. This consisted of expenditures for the professional services of physicians and surgeons, for hospital charges and nurses' compensation, for the hire

of automobiles and for servants' hire in his household. There was evidence also from which it might be found that after the trial it would be necessary for the plaintiff to make some further expenditures for medical attendance upon his wife and for extra domestic servants' hire. We think from the testimony that the sum of twelve hundred dollars will amply cover the plaintiff's damage due to the loss of his wife's services and to the expense to which he has been or will be put by reason of said injuries to his wife.

At the trial both the plaintiff and his wife testified that as a result of the wife's injuries the plaintiff was not able to have "marital relations" with his wife. In considering the amount of damages awarded said justice in his decision upon the motion for new trial said, "Testimony was given of impairment of her capacity for sexual intercourse. The matter was dwelt on in argument. From the fact that she has to a great extent resumed the sort of work she did before the accident and from the size of the verdict it is evident that the testimony to this condition heavily enhanced the damages awarded." In argument before us counsel for the plaintiff has urged that the plaintiff's loss of sexual intercourse with his wife is a proper element of damage for which he should be awarded compensation. It quite clearly appears, and such was the view of counsel that a considerable part of the verdict was based upon a finding that by reason of his wife's injuries resulting from the accident the plaintiff had been deprived of the exercise of this element of his right of consortium and that the jury had

given compensation therefor. The question is thus clearly presented to us as to whether such loss constitutes an element of damage for which the plaintiff can have recovery in this action.

The term "consortium" refers to the aggregate of the elements of conjugal fellowship and assistance which arise to either spouse from the marriage relation. In either it involves the right to the companionship, solace and affection of the other, and undoubtedly includes that incident of the marital relation which we are now considering. Although these are sometimes referred to as the sentimental elements of consortium, they are undoubtedly substantial and vital factors in producing and sustaining the union to the advantage of each spouse. With respect to the husband, consortium also includes the right to receive the wife's services about his household and her assistance in the education and care of his children.

In case of the alienation of the affection of either husband or wife the wrongdoer has directly and maliciously invaded this right and destroyed its enjoyment. The wrong is committed directly against the injured spouse. The gravamen of the action for alienation of affection is not the loss of service but the loss of conjugal society and cohabitation. The action exists in favor of the wife as well as the husband, and damages are given against the wrongdoer as punishment for the wrongful act. The law does not attempt to measure the pecuniary loss and give damages as compensation. In such action it is considered that it is to what we have termed the sentimental side of the consortium that legal injury has been

done. The Supreme Court of Connecticut in *Marri vs. Stanford, &c., Co.*, 84 Conn. 8, said: "In some cases, as where the wrong was criminal conversation, the loss of conjugal society and affection might stand out and be emphasized as the pre-eminent and possibly sole basis of recovery."

When a wife has been injured by the negligent act of another, there has not been an intentional wrong committed against the husband. There cannot be said to be a direct injury to other than the practical and material elements of his right of consortium. A husband has a right of action but his recovery must be of compensation and is not given by way of punishment. In reference to the measure of damages in such action courts have frequently said that the husband can recover for the injury to his consortium but within that term is the husband's right to the services of his wife, and it is solely for that and for his expenses that recovery has generally been permitted. In *Furnish vs. Missouri, &c., Co.*, 102 Mo. 669, the court held that a husband is entitled to be compensated for the loss of his wife's society resulting from the defendant's negligence and said, "By the term 'society' in this connection is meant such capacities for usefulness, aid and comfort as a wife which she possessed at the time of the injury." From an examination of the opinion of other courts it seems plain that the great weight of authority is that in this class of cases whatever may be the general language used by the courts as to the nature of the husband's damage, the basis of his recovery, is his loss of the services of the wife growing out

of her injury and is restricted to that element of the consortium, together with the loss of his estate in connection with the expenses to which he has been put in consequence of her disability.

The law will not attempt to fix pecuniary compensation in favor of the husband for the indirect effect which the wife's injuries may have had upon the sentimental side of the consortium. This is particularly true with reference to that element of consortium which we are now considering. Courts will not conduct an investigation for the purpose of fixing a monetary estimate upon the extent of such loss.

Although the language of their opinion is not explicit, courts in some instances appear to deny recovery to the husband on the ground that the wife had recovered or may recover for the same matter in her action for damages arising from her injury. We do not base our determination upon that ground, as in our view the wife's recovery does not include the personal loss of which the husband complains. The governing principle seems to us to be rather that this loss to both husband and wife is of a nature which courts would not attempt to compensate in pecuniary damages. If by reason of the negligence of a defendant there has been an injury to a woman's sexual organs, impairing their functions, the extent of the impairment may well be considered in determining the amount of compensation which should be awarded to her for the injury just as would properly be done with respect to the impairment of the functions of any other organ of her body. The woman would recover for the diminution of those particular physical powers; but the court

will not attempt to measure the loss which she may have suffered by being unable to exercise those powers for any period; nor will it measure the loss to her husband arising indirectly from the same cause.

With us the elements of a husband's damage resulting from his wife's injury due to the negligence of a defendant are restricted to compensation for the loss of his wife's services and to his expenses in caring for his wife and in attempting to cure or repair her injury.

In *Larisa vs. Tiffany*, 42 R. I. 148, the plaintiff finds language from which it argues that this court does not intend in actions of this kind to limit a husband's recovery as we have just set forth. The point under consideration in that case was as to whether a husband, who had been deprived of his wife's services in consequence of her personal injuries due to a defective highway, could properly be said to have suffered "damage to his property" within the meaning of Section 15, Chapter 46, General Laws 1909. The court was considering the nature of consortium generally and not the measure of damages for an injury to any of its elements. In said opinion authorities were cited which appeared to support the court's position that consortium was a property right. It chanced that the cases referred to were for alienation of affection, but the purpose of their citation by us was their general treatment of the question which we had under discussion in accordance with the view of this court. We had no intention of extending the scope of a husband's recovery in the class of actions now under consideration so that it should include damages for injury to the sentimental as well as the practical side of his right of consortium.

We are of the opinion that the sum of twelve hundred dollars will afford ample compensation to this plaintiff for such injuries as the evidence shows he has suffered or is likely to suffer by reason of

the negligence of the defendant, and for which he is entitled to recover.

The defendant's exception is sustained. The case is remitted to the Superior Court for a new trial unless on or before April 18, 1922, the plaintiff files in the office of the clerk of the Superior Court for the counties of Providence and Bristol a remittitur of all of said verdict in excess of twelve hundred dollars. If such remittitur is filed the Superior Court is directed to enter judgment for the plaintiff in the sum of twelve hundred dollars.

For Plaintiff: S. S. Bromson and J. J. Nolan.

For Defendant: R. T. Barnefield and Pirce & Sherwood.

SUPREME COURT

Bridget J. McEvoy	} Equity No. 544
vs.	
Mary Etta McEvoy	

RESCRIPT

Prayer of bill granted.

Parties may present a form of decree in accordance therewith on Monday, April 17, 1922, at 10 o'clock a. m.

For Petitioner: P. J. Fox and Cooney & Cooney.

For Respondent: C. J. O'Connor and C. A. Walsh.

SUPERIOR COURT

Isaac Beck	} No. 49863
vs.	
Leo R. Boudron	

DECISION

BROWN, J. The plaintiff was driving his horse, drawing an express wagon, at the corner of Elmwood avenue and Pawtuxet avenue, on his way to Providence from Apponaug on the 9th day of February, 1921. It was

about 8:15 o'clock in the evening. It was dark and raining a little, foggy and misty. On the wagon were some chicken crates which obstructed the defendant's view, somewhat, of the wagon from behind. The plaintiff testifies that he was driving on the right hand side of the road when the defendant came up from behind, struck his hind wheel and knocked him off his seat, doing the injury complained of. He further testified he had a lantern which was lighted at the time on the left hand side of his wagon, in front of the rear wheel and behind the middle brace on the side of the wagon. He testified that he saw electric lights all around, and that about two minutes before the accident he saw his lantern.

The defendant testified he was driving from 15 to 18 miles an hour; that his head lights were lighted, and that there was fog arising from the ground; that the ground was warm, and the visibility was very, very poor; that he first saw the plaintiff's wagon at the junction of Elmwood avenue and Pawtuxet avenue, when he was approximately opposite Pawtuxet avenue, and that the plaintiff was at the time twenty feet ahead from his position in his machine; that he was a little nearer the right than the centre of the road.

Q. Could you from that position see any light on his wagon?

A. No, sir.

The defendant further testified that he immediately applied the brake and began to slide, and that he pushed up against the plaintiff, and that the right hand corner of his radiator hit about half way the rear-end of the wagon. He testified that plaintiff's lantern was hung front of the cross-brace on the side of plaintiff's wagon.

There was evidence that the plaintiff's lantern did not reflect light because the chimney was dirty, and because of its

position ahead of the cross-brace and presence of the chicken crates.

The evidence strongly preponderates to the effect that the light, if there was any at the time on the plaintiff's wagon, was not of such character as to comply with the requirement in that respect of Chapter 1028, Section 1, of the Public Laws, which requires that "every vehicle, when located or operated on any public highway, or bridge, shall display one or more lights on said vehicle, so placed as to be visible both in front and the rear, during the period from one hour after sunset to one hour before sunrise."

There was evidence that the defendant, if using such care as he ought to on the occasion in question might have seen the plaintiff's vehicle and avoided the accident, notwithstanding the plaintiff's failure to comply with the statute above.

An electric light suspended from an arm projecting over the intersection of the two streets where the accident occurred afforded sufficient light for that purpose, and more especially so in connection with the head lights of the defendant's machine, which were lighted at the time.

The jury was warranted in finding that the highway was so well lighted at the time and place that the plaintiff's vehicle could be plainly seen by the defendant. In such case the plaintiff is not precluded from recovering by reason of his failure to comply with the statute.

Surmeian vs. Simons, 42 R. I. 334.

The accident in the case at bar occurred at the same place of the accident in the case above cited.

A new trial is denied.

For Plaintiff: Bellin & Bellin.

For Defendant: John L. Curran.

SUPERIOR COURT

Minnie B. Nickerson

vs.

Amber I. Remington, Admx.

} P.A.No.808

RESCRIPT

TANNER, P. J. This is a probate appeal from the allowance of an administratrix's account. The only question presented for decision is: When real estate of a decedent is encumbered by a mortgage created before marriage, should dower be computed upon the full value of the property, including the amount of the mortgage or upon the value of the husband's equity of redemption?

Two Rhode Island cases have decided that dower should be computed upon the full value of the real estate sought to be charged even though the real estate in question must be sold to pay the mortgage upon it.

Mathewson vs. Smith, 1 R. I. 22.

Mowry vs. Mowry, 24 R. I. 565.

It is argued by the appellant that the case of Sheffield vs. Cooke, 39 R. I. 217, at pages 261 and 262, has overruled the two cases just cited. We do not think so. All the last named case decided was that dower was subject to liens and encumbrances placed upon real estate prior to its inheritance by the husband of the widow claiming the dower. The authorities cited in Sheffield vs. Cooke, supra, upon this point seem to us merely to mean that encumbrances upon real estate prior to marriage are superior to dower so far as the owner of the encumbrance or lien is concerned, but not to decide that the title of heirs is not subject to the dower right of the widow, so that the widow would not have dower in the full value of the real estate rather than in the equity.

For these reasons we feel obliged to deny this appeal.

For Appellant: O. Lapham.

For Appellee: C. R. Easton.

Statement of the ownership, management, circulation, etc., required by the Act of Congress of August 24, 1912 of Rhode Island Law Record, published weekly except July, August and September, at Providence, R. I., for April 1, 1922.

State of Rhode Island.
County of Providence, ss.:

Before me, a notary public, in and for the State and county aforesaid, personally appeared Charles S. Cassidy, who, having been duly sworn according to law, deposes and says that he is the editor of the Rhode Island Law Record and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor and business managers are:

Name of—	Post Office Address—
Publisher, Charles S. Cassidy,	518 Howard Bldg., Providence, R. I.
Editor, Charles S. Cassidy,	518 Howard Bldg., Providence, R. I.
Managing Editor, None.	
Business Manager, Charles S. Cassidy,	518 Howard Bldg., Providence, R. I.

2. That the owners are (Give names and addresses of individual owners, or, if a corporation, give its name and the names and addresses of stockholders owning or holding 1 per cent. or more of the total amount of stock): Charles S. Cassidy, 518 Howard Bldg., Providence, R. I.; Harvey A. Baker, 837 Industrial Trust Bldg., Providence, R. I.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent. or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state) None.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company, but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed through the mails or otherwise, to paid subscribers during the six months preceding the date shown above is..... (This information is required from daily publications only.)

CHARLES S. CASSIDY.

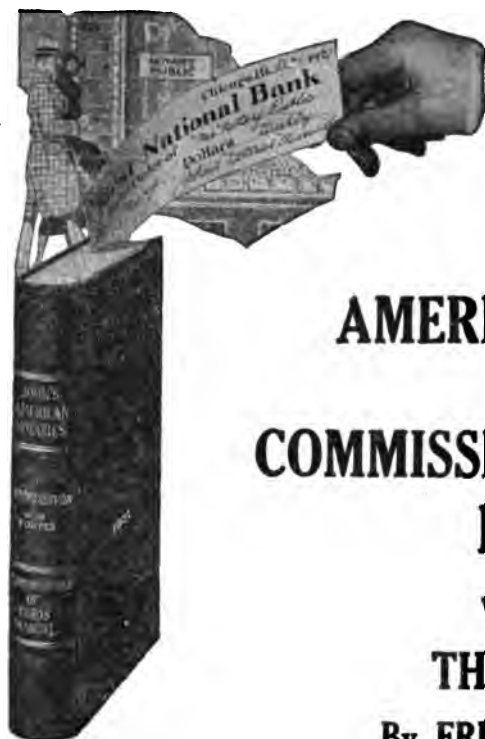
Sworn to and subscribed before me this 4th day of April, 1922.

(Seal.) Everard Appleton, Notary Public.

(My commission expires June 30, 1923.)

Form 3526.—Ed. 1916.

Note.—This statement must be made in duplicate and both copies delivered by the publisher to the postmaster, who shall send one copy to the Third Assistant Postmaster General (Division of Classification), Washington D. C., and retain the other in the files of the post office. The publisher must publish a copy of this statement in the second issue printed next after its filing.



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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 29

APRIL 21, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Supreme Court Calendar

MONDAY, APRIL 24, 1922

Eq 527GM&H-P&S	W. E. Louttit vs A. Alexander	M & M
Eq 528 J P B	Peter R. Morris vs Bernard V. Morris et al.	F & H
Eq 541 J C S	A. Furtado vs Frank Silva et al.	E R W
Eq 534 W R P	Laura I. Creaser vs Laura J. Thatcher	D E G
Ex5585 L & M	Rose Berger vs Samuel Berger	R & R
Ex5593 S & H	A. Cascanibas vs F. H. Swan et al.	C W-E A S

WEDNESDAY, APRIL 26, 1922

Ex5551 C & C	J. C. Percelay vs Jenckes Spinning Company	C A W
Ex5588 J F H	Josephine Macchia vs J. H. Ducharme	A & A-J B
Ex H E & M	Industrial Trust Co., Admr. vs J. McLaughlin et al.	C & C

FRIDAY, APRIL 28, 1922

Eq 538 J L C	Mary J. Gilbane vs Union Trust Company	G M & H
Ex5568 A G C	John M. Gilblin vs Dudley Hardware Company	G H & A
Ex5617 T L C	Patrick McVay vs Walter L. Kelley	J P B
Ex5579 W & G	Jennie F. Congdon vs Louis H. Block	C & C

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, APRIL 24, 1922

JTW51767 J S-GFT	Mack Motor Truck Co. vs T. Dorsey	C S S
5701 B C	Carolina Paliano vs G. Bana	J V-B
51250 E & A	Wauregan Company vs J. C. Davis	E R P
49157 W A G	G. H. O'Brien vs F. W. Wallace	F
Eq5752 J P B	M. S. Pearl vs Samuel A. Pearl	R & R

TUESDAY, APRIL 25, 1922

Eq5048 A G	D. F. Inman vs G. S. Inman et al.	F H H
52883 J H C	Mary A. Donahue, Admx. vs F. C. Pettis	F & H
46939 J H C	Florence E Donahue vs Frank C. Pettis	F & H
Eq5801 W C & C	H. S. Cruft vs M. Bedrosian	
52086 G H & A	Mex. Pet. Corp. vs Phillips Wire Company	T & C
Eq5091 McG & S	D. Basile vs Vincent Colaldo	
B & B		
Eq5790 L W D	W. A. Irwin et al. A. Paolino, Jr.	
Eq5742	John Baldwin et al. vs G. F. Flaherty Co., Inc.	

WEDNESDAY, APRIL 26, 1922

Eq5789 McS-W	Lucy A. Apace vs N. Sallinger	P & D
Eq5666 J F C	R. I. Imp. Cement Co. vs C. Collanino	P & D
Eq5667 J F C	R. I. Imp. Cement Co. vs C. Collanino	P & D
Eq5786 C C & McC	George H. Jacques vs Arthur Sherman	E B A

Jury Trial Calendar

MONDAY, MAY 1, 1922

39059 C E S-F	Daniel A. Clarke vs Ernest E. Howard	F H W
45879 G. J. S.	Frank C. Pettis vs Allie J. Zura	McG & S
45845 McG & S	Allie J. Zura vs Frank C. Pettis	G J S
51837 J E B	Walter Kami vs Union Liberty Company	J T B
41452 F & H	William McClarnon vs Jacob Breuver	W G & C
50606 R & H	Palma H. Walsh vs Frederick Suter	J H
50607 R & H	James J. Walsh vs Frederick Suter	J H
52133 E H Z-K	William Wiswall vs Orel E. McDuff	T J McG
52355 E C S	A. Creton & Company vs C. Alianello	B C
52006 E C S	Ohio Pottery & Glair Co. vs Mch. & Tool Co.	C C R
44753 E R E	Emily Manton vs Walter L. Clarke, C. T.	E S C-E

TUESDAY, MAY 2, 1922

50981 A & A	H. O. Huot vs Harold C. Osler	W S F
49442 J B Lawlor	Eddy Rotary Oil Burner Co. vs Bevan H. Mills	W & W
50659 F & H	Peter Campasini, p. a. vs William D. Shaw	S K & S
50660 F & H	Maria Targnoli vs William D. Shaw	S K & S
50608 E C S	Standard Trunk & Bag Co. vs American Furn. Co.	J G C
P.A.809 F & H	Joseph A. Germain vs Romubus Gaudette, Exr.	A & A
38165 E W & R	Albert B. Emery vs Carlo Colalo alias	P & DeP
48795 J A Enos	Frank Govia vs Frank Lima	J F C
52120 J C S	Fiorentino Schiavina vs Carmela Schiavino	P & DeP
49973 W S F	Mary E. McCormick vs John C. Lyons	L & McD

WEDNESDAY, MAY 3, 1922

49666 Vance	Paula Senna vs Walerya Walsh	Dexter
51267 P & DeP	Concetta LaFrazia, p. a. vs Francesco Ricci	Jackvony
51268 P & DeP	Mary Pezzullo, p. a. vs Francesco Ricci	Jackvony
51963 F & H	Mary T. McQuaide vs United Elec. Ry. Co.	Sweeney
50754 B & B	David F. Silbert & Co. vs Guisepppe Peluso	J V
48956 B-McC	John S. Sima vs Seneca J. Stone et als.	W S F
48957 B-McC	Manuel Lima vs Seneca J. Stone et als.	W S F
51256 P R	Antonio Rinalde vs Thomas J. Tierney	A G C
49655 R J McM	Manuel Goncalves vs Silvestre Mor	P & DeP
52863 G E & C	C. P. Darling Co. vs Nut Grove Butter Co.	W C & C
31649 E M S	Michele DePasquale vs Wallace E. Jameson	G & C

THURSDAY, MAY 4, 1922

50189 W A G	Rex Manufacturing Co. vs Walter Hunold	F & M
P.A.739 D H M	Marion Mason vs Job L. Grant et al.	F & H
P.A.740 E C S	Ruth W. Munroe vs Job L. Grant et al.	F & H
50963 G W B., Jr.	Julia E. Keegan vs Thomas K. Fiser et al.	P & DeP
50632 J L Casey	Rosina D'Andrea vs Guisepppe Leonardo	
49313 M & T	James D. Whittaker vs R. C. N. Mfg. Co.	T P C
51121 K H & F	Joseph C. Cawley vs Elizabeth L. Baxter	E H Z
51891 J S-B	Frank Lury vs Varnet Feldman	McG & S
52466 C & DeS	Santie Grandi, p. a. vs James Alterie	L V J
51953 L B & McC	Faye Coleman vs Times Sq. Auto Sup. Co., Inc.	E & M
51954 L B & McC	Lottie Gilmore vs Times Sq. Auto Sup. Co., Inc.	H E & M
52749 T J McG	Margaret Fitzpatrick vs G. L. Hoyle	B

FRIDAY, MAY 5, 1922

49014 E H Z-K	Harold Thorell, p. a. vs Frank E. LaPlante	T F V
51132 Stockwell	John E. Ivens vs Herbert E. Barney, T. T.	A T P
51133 Stockwell	Jane Ivens vs Herbert E. Barney, T. T.	A T P
M.P.453 C M B & L	Charles B. Moffitt et al. vs City of Providence	E S C
52324 F & H	George N. Dunbar vs Norman Harris	P & S
52325 F & H	Mary E. Dunbar vs Norman Harris	P & S
52246 Z-K	Emma Coffey vs Globe Indemnity Company	G E & C
48980 S-M	First People's Trust Co. vs Robt. E. Quinn, Assignee	Q & K
48981 S-M	First People's Trust Co. vs Robt. E. Quinn, Assignee	Q & K
45221 F & H	Harold Hitchcock vs William H. Cooney	C & C
52750 W E R	Hattie S. V. Brayton vs Hardin I. Fiske et al.	
49715 D E G.	Louis W. Nodeau vs Edmund Deachaine	G E & C

District Court Appeals Calendar

MONDAY, MAY 1, 1922

51361 Slocum	Jonathan Andrews et al. vs Rosa Rezzo, Ap.	A & A
50290 Vance	Peter J. Ford vs Thomas J. Hayes, Ap.	C C & McC
51609 J H C	Cosmo Salvatore, Ap. vs Salvatore Latterra	J Veneziale
51604 M & T	Baltimore Hub Wheel Mfg. Co. vs Miller, Inc., Ap.	F H W
48972 C R E	Christopher Albanese vs John Conti, Ap.	L V J
51574 J A T	J. Edwards Kerney vs David Morris, Ap.	McK & B
50103 W H McS	Michaels-Bauer, Inc. vs William B. Gooding	Wildes
46078 B & B	S. Klein & Sons vs Certain-teed Prod. Corp., Ap.	S & M
52347 P & DeP	Vincenzo Pettine, Ap. vs Joseph Santune	B C
52353 R & R	David Bida vs Benjamin Weinstaub, Ap.	C H
52354 R & R	Philip Swartz vs Tobio Petrucci, Ap.	J R
52443 R & R	Roy S. Whitmore vs A. J. Lifebore, Ap.	P & DeP
52499 R & R	Anna P. Hewitt, Ap. vs Metropolitan Life Ins. Co.	F & L
52500 R & R	Samuel Kennison, Ap. vs James C. Davis	E J P
48079 Stiness	Bernard Feldman, Ap. vs S. K. Merrill Co.	L B & McC
52634 Stiness	Jonathan Andrews et al., Ap. vs A. O'Dette et al.	E R Walsh
52583 W M P B	John F. McGair vs Jacob Sherman, Ap.	J. S
52110 J J C	Michael J. Murphy vs Arthur P. Weeden, Ap.	G E & C
50922 C R E	Daniel Kitchen vs John Broadman, Ap.	McG & S
50368 C R E	Daniel Kitchen vs John Broadman, Ap.	McG & S
50105 C R E	Daniel Kitchen vs John Broadman, Ap.	McG & S

TUESDAY, MAY 2, 1922

48556 M F C	Karahren Badarosian vs Hagop Surmeian, Ap.	C & C
51584 J R D	M. B. S. Co. vs Emanuel Fisher, Ap.	R & R
50359 C S S	Boston Radiator Works vs J. Moskol, Ap.	R & R
49256 C S S	Smith & Holden Co. vs Eugene Electric Co., Ap.	P & DeP
49588 E P B A	Art League vs Bernstein, Inc., Ap.	T F V
51344 R & R	Russell Land Co. vs Henry Mulvaney, Ap.	J P H
51966 S-M-B	Proctor Gamble Dist. Co. vs Malcom Bros., Ap.	Raymond
51053 S-M-B	Listman Mills, Ap. vs Frank P. DelDeo	P C
52289 AS & AP J	H. L. Handy Co. vs Stanislaw Wilk, Ap.	R J McM
52501 R & R	Hyman Salk vs James P. Fogarty, Ap.	B & L
51059 M-B-E C S	Alexander Hamilton Inst. vs John D. Ellis, Ap.	I M
50728 E H Z	A. J. Frensel vs Seth Hopp, Ap.	D A C
49321 C S S	Israel Chernich, Ap. vs Peoples Credit Co.	R G E H
52665 J E B	James Kownabis vs Gus Dukal alias Ap.	R J McM
50577 J P B	William H. Thomas, Ap. vs Jeremiah Wilcox	J H
44928 C R E	Santo Nanni, Ap. vs Domenico Malveto	P & DeP
47810 J V	Antonio DiPippo vs Ernesto Santoro	C & B

44366 C R E	Horace M. Williams, Ap. vs Everett Forestry Co.	I M
33115 P & C	Frank B. Long vs Caroline E. Bowen	J C S
42227 Veneziale	Raffaele DiMarco vs Palma Centofonti, Ap.	D-B
53064	Annie Frishenbaum vs Peter Comrad	Q & McK
51598 P Romano	Vincenzo Vicario vs Amedeo Narducci, Ap.	J V
49089 P & DeP	The New England Grocery Co. vs B. Mansuette, Ap.	C R E
52699 G M & H	Charles Dworchak et al. vs Charles Cranshaw, Ap.	F L N

WEDNESDAY, MAY 3, 1922

51505 McK & B	Joseph Ciallella vs Rosina M. Farina	J A H
51658 W M P B	Rocco Pavulla, Ap. vs George Eta	F & M
50382 C S S	Union Paper Co. vs F. A. Marsden, Ap.	G A B
49560 C S S	Abraham Adler vs S. Krakowskey, Ap.	D A C
48600 C S S	Max Rosen vs Sam Golden, Ap.	I M
51606 M & T	D. G. Canty vs James E. Daley, Ap.	J C C
51323 C Z A	Aushell Turoff vs A. White alias Ap.	G H
49765 Stiness-M-B	Henry W. Hamburger Co., Ap. vs Max Dentz	R & R
52231 E C S	John Wanamaker, Ap. vs Arthur V. Sweeney	D E G
44560 M G & S	Alfred Cousins vs Concepta D. Fidalgo alias Ap.	I M
47230 J F H., Jr.	John F. Harolw, Ap. vs Elizabeth Richards	T C
46034 J L J	D. W. Bellows & Son vs Thomas Baldwin, Ap.	B & C
49759 S-M-B	Smyrna Fruit Co., Ap. vs United W'sale Groc. Co.	P & DeP
52175 Com & Can	Eugene A. Desmerais vs Thomas Falaglia, Ap.	J C S
52757 W R P	Frank A. Williams vs Howard V. Allen, T. T.	H R C
48361 R & H	Lewis B. Whipple vs Philip Swartz, Ap.	R & R
52359 J C LeC	J. Thomas Johnson vs Nathan Selengut, Ap.	R T B
51972 P & DeP	Jemal Siliman, Ap. vs Murat Mustafa	R & R
52151 J E B	Harry Lichas vs Peter Panagiotacopoulos	J C
53054 C & C	Anastasia P. O'Keefe vs Francesco Librandi	C & C
51663 Slocum	Albert F. Justin vs George H. Armitage, Ap.	S K & S

THURSDAY, MAY 4, 1922

45683 W M P B	Joseph Calone vs Peter Roberts	C & C
44932 R G E H	Nathan Sallinger vs Joseph Pabuarcci	B C
51730 Slocum	Smith & Holden Co. vs U. S. Auto Top. Co., Ap.	B C
51731 Slocum	The Arc Vulcanizing Co. vs Isadore Broomfield, Ap.	R & R
51808 D A C	Allen J. Hodge, Ap. vs Met. Wholesale Groc. Co.	McG & S
51974 R & R	Gilmore Textile Co. vs K. Kazarian, Ap.	Slocum
52237 E C S	Myrtle Jefferson vs Arthur Lolliper, Ap.	McS
50684 S-M-B	Lewsen Mfg. Co., Ap. vs Millers, Inc.	F H W
51283 B S & L	James S. Grant vs Harry Jacobs alias Ap.	C L
45830 R G E H	Robert Macdonald vs Morris Salk, Ap.	R & R
52062 J R D-V	John McLaren vs Joseph Smith, Ap.	P & DeP
51292 F & H	Prov. Malt & Hop Co. vs Wilfred Doran, Ap.	C J O'C
51293 F & H	Prov. Malt & Hop Co. vs Sidney R. Gilmore, Ap.	C J O'C
50095 W H W	Everett H. Dexter vs Frank Boffoni et al., Ap.	P & DeP
52628 G H & A	The Morris Plan Co. of R. I. vs Wm. H. Logan alias	J G LeC
52701 Stiness-M-B	Outlet Co., Ap. vs Arthur S. Lippack	C & C
52778 G H & A	Morris Plan Co. of R. I. vs Thomas Smith, Ap.	C A W
52779 G H & A	Morris Plan Co. of R. I. vs L. A. Grace, Ap.	C A W
47437 J P B	Frank P. McIvard, Ap. vs Byron S. Williams	McG & S
49495 Stiness-M-B	Cayuga Linen & Cot. Mills vs Eastern Br. Co., Ap.	W & O
50099 Brand	Nielsen & Kittle vs Gennaro S. Onorato, Ap.	P & DeP
52904 G M & H	Harriet C. Bohl vs J. B. McGlynn, Ap.	B & B
50312 C R E	Daniel Kitchen vs. Leon Rosenfeld et al., Ap.	McG & S

FRIDAY, MAY 5, 1922

49270 F & H	Frances L. O'Rourke vs Harry L. Jacobs, Ap.	R T B
49278 R T B	Harry Loeb Jacobs, Ap. vs Joseph L. O'Rourke	W C & C
51733 Slocum	William Richardson, Jr. vs Lena M. Inman, Ap.	F & H
49731 R & R	Manhattan W'sale Groc. Co. vs Philip Mitchell, Ap.	B & B
51021 J F M	Manuel Costa vs Jose Julio, Ap.	J S N

43359 Stiness-M	Premant Wineiy vs D. Serralunga, Ap.	J P B
52021 Stiness	North American Shoe Co., Ap. vs Sarrava Bros.	B
50015 F & M	Mary J. D'Avedisian vs Lawrence Scrivano, Ap.	P & DeP
50560 R G E H	Nathan Sallinger vs William David, Ap.	C J O'C
47738 A H B	Nicola DelMastro vs Fausto Napolitano, Ap.	R V
51726 W R P	Andrew Scotts et al. vs Harvey La France	E R W
52651 W S J	Spiraden Pappas vs Jerry Lucas, Ap.	S N
52662 G H & A	J. J. Mahon Co. vs James Elliot, alias Ap.	T L C
52703 Stiness	Peggy Ware Co., Ap. vs Byrne & Reynolds	J E D
52709 A S J-J	Charles H. Decousta vs Ernest V. Fiske alias Ap.	M & M
52632 J H McG	Dr. Fred A. Coughlin, Ap. vs The U. E. Ry Co.	Kiernan
46154 C R E	Antonio Strogoli vs Rec. Rhode, Island Company	Kiernan
49087 T F V	Modern Mach. Co. vs Kasper Kazarian, Ap.	J R
53089 F B C	Clifford Holman vs Pearl White, Ap.	M F C
52765 McG & S	Fannie A. Blunt vs Nettie Wilcox, Ap.	M & T
51076 G M & H	Mark Shepard vs Arthur L. Stone, Ap.	E M & E J S
52108 L B & McC	Roberts Oake of N. E. Inc. vs F. A. Marsden, Ap.	Breaden
52894 F H B	Mahoney & Rubin vs Wood Drug Store Co., Ap.	G H
52893 F H B	Mahoney & Rubin vs H. L. Stepkin, Ap.	G H

SUPREME COURT

City of Providence
Benefit of
Pierre Michaud
vs.
Victor Laurence et al. } Ex. &c. No. 5574

City of Providence
Benefit of
Mary Anne Michaud
vs.
Victor Laurence et al. } Ex. &c. No. 5575

OPINION

(Before Barrows, J., Below)

SWEENEY, J. These are actions of debt on the same bond brought in the name of the City of Providence by residents therein against Joseph G. Laurence as principal and Victor Laurence as surety, both of West Warwick in the County of Kent. The actions are brought by husband and wife and are based upon personal injuries received by her while riding as a passenger in an automobile operated by the defendant, Joseph O. Laurence.

Each declaration averred that said defendant, Joseph O. Laurence, operated an automobile in the so-called jitney

business between Warwick Centre Square, West Warwick, and the city of Providence; that said Mary Anne Michaud boarded said automobile in West Warwick for the purpose of being transported to the city of Providence; and that while she was being transported in said automobile, over a public highway in the city of Cranston along the route to said Providence, said defendant so negligently operated said automobile that it collided with another automobile and said Mary Anne Michaud sustained severe bodily injuries. The declarations also averred that July 2, 1920, the defendant signed, sealed, executed, and delivered their bond to the said city of Providence as obligee, for the purpose of enabling said Joseph O. Laurence to procure a license from the Board of Police Commissioners of said city to operate a motor bus in the business of transporting, in said city, passengers for hire, and undertook and agreed in said bond to pay all damages sustained by any person which might be caused by the negligent or unlawful action of said operator, or his agents, in use or operation of said motor bus.

The defendants demurred to the declarations on the ground that they had not obligated themselves to pay for any dam-

ages sustained in the city of Cranston. The demurrers were sustained by a justice of the Superior Court and the plaintiffs have brought the cases to this court upon their bills of exception, claiming that said action was contrary to law.

Chapter 1263 of the Public Laws, passed at the January Session, 1915, authorized each city and town to regulate, by ordinance, the business of transporting, in such city or town, passengers for hire by means of any motor vehicle.

Acting under the authority conferred by said chapter, the City Council of the city of Providence passed an ordinance providing for licensing motor busses and regulating the operation thereof in said city. Said ordinance is known as Chapter 93 and was approved May 19, 1915. It provides, among other things, that no person shall engage in the business of transporting in the city of Providence passengers for hire by means of any motor vehicle without first obtaining a special annual license for each vehicle employed by him in such business. It also provides that no person shall operate a motor bus in any street or public place in said city without first obtaining a special annual chauffeur's license therefor. The ordinance fixes the amount of such license fees and designates the Board of Police Commissioners of said city as the administrative body to issue said licenses. The ordinance contains many provisions regulating the operation of said motor busses upon any street or public place in said city.

Said ordinance also provides (Sec. 9) that no license shall be issued for any motor bus until there has been filed with said Board of Police Commissioners a bond running to the city of Providence in an amount to be computed at the rate of \$500 per seat of the passenger seating capacity thereof, with surety conditioned in substance to pay all damages

sustained by any person injured in his person or property by any careless, negligent or unlawful act on the part of the principal named in such bond or his employees in the conduct of his said business, or in the use or operation of such motor bus employed by him therein, and such bond shall be maintained during the term of the license and shall run until the liability thereunder has ceased.

The purpose of the General Assembly in passing said Chapter 1263 was to empower each city and town, desiring to do so to regulate the business of transporting passengers for hire by means of motor vehicles. If a municipality does not wish to avail itself of the power to regulate such business within its confines then any person may engage in said business therein without regulation, subject only to the general laws relating to the operation of motor vehicles. The ordinances passed by the City Council of Providence affects the operation of such motor vehicles only within the limits of the city and has no extra territorial effect. The bond required by said ordinance to be given to said city in order to procure a license to operate a motor bus is for the manifest purpose of giving a person injured by the negligent operation of such licensed motor bus, within the limits of said city, some opportunity to collect the damage sustained by him. To hold that a person, injured by the negligent operation of such motor bus outside of the limits of the city, could sue upon the bond given to said city might deprive a person injured by the same motor bus, within the limits of said city, of an opportunity to collect the damage sustained by him by suit upon said bond. The bond itself states that it is given for the purpose of enabling the principal to secure a license to operate a motor bus in said city, and the surety on the bond is only chargeable according

to its strict terms and conditions. Two cases bearing upon this question are *Bartlett et al. vs Lamphier et al.*, 162 Pac. Rep. 532, and *Fischer vs Pollitt*, 112 Atl. Rep., 305.

As the license to operate the motor bus under said ordinance is limited to the city of Providence, and the bond is conditioned to pay damages sustained on account of the negligence of the principal or his employees in the conduct of said business within the limits of said city, there was no error in the action of the court in sustaining the demurrers to the declarations.

All of the plaintiffs' exceptions are overruled and the cases are remitted to the Superior Court for further proceedings.

For Plaintiff: Archambault & Archambault.

For Defendant: Murphy & Geary.

SUPREME COURT

Hannah M. A. Hathaway
vs.
Carrie F. Reynolds } Ex. &c. No. 5553

OPINION

(Heard Before Blodgett, J., Below)

RATHBUN, J. This is an action of trespass on the case for slander. The trial in the Superior Court resulted in a verdict for the plaintiff for \$1500. The defendant made a motion for a new trial. The trial court refused to disturb the findings of the jury on the question of liability, but found that the amount of damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit all damages in excess of \$1000. The plaintiff did not file a remittitur, but excepted to the decision of said justice.

The case is before this court on plaintiff's exception to the decision granting

a new trial and on defendant's exception to the refusal of said justice to grant a new trial without condition; also on certain exceptions of the defendant taken to the rulings of the court during the trial.

The declarations alleges that the defendant in the presence and hearing of divers persons, charged the plaintiff, a married woman and mother of children, with adultery and unchastity, by addressing the plaintiff as follows: "You haven't a young one that belongs to your own husband."

The plaintiff and defendant are sisters. On Sunday morning, July 4th, 1920, the plaintiff, accompanied by two children and Mrs. Sarah E. Abbott, whose husband was a cousin of the parties, called at the back door of the defendant's home, which is in a rural section. The defendant invited the visitors to enter the house, but the invitation was declined. It is clear from the testimony that the parties quarreled almost continuously from the beginning to the end of the visit, which occupied a period of about ten minutes. The plaintiff contends that during the course of the visit the defendant uttered the words of which she complains. The defendant and her husband denied that the words of which the plaintiff complains were spoken by the defendant.

The defendant's motion for a new trial was made on the usual grounds and also on the ground that Charles G. Cherry, one of the jurors on the panel, which tried the case, was a second cousin of the plaintiff's husband and also on the ground that the plaintiff's husband held a conversation with said juror at some time during the course of the trial. It appears that the defendant did not learn until after the verdict was rendered that the juror, Cherry, was a cousin of plaintiff's husband. Affidavits were filed stating that no friendly or social relations existed, or ever existed, between either

the plaintiff or her husband and said Cherry. The trial justice found that the juror, Cherry, was "indifferent in the cause." If said justice had made the same finding when the juror was called it would have been within the discretion of said justice to permit the juror to serve. G. L. 1909, Chap. 279, Section 37, is as follows: "The court shall, on motion of either party in a suit, examine on oath a person who is called as a juror therein, to know whether he is related to either party, or has any interest in the cause, or has expressed or formed an opinion, or is sensible of any bias or prejudice therein, and the party objecting to the juror may introduce any other competent evidence in support of the objection. If it appears to the court that the juror does not stand indifferent in the cause, another shall be called in his stead for the trial of that cause." After affidavits were presented by both parties said justice carefully considered the question whether the juror's relationship to the plaintiff's husband caused the juror to "stand" not "indifferent in the cause." It was the duty to pass upon this question and nothing has been suggested to indicate that he abused his discretion in refusing to grant a new trial on this ground. Said Section 37 is substantially the same as a statute in force in Massachusetts. In *Woodward vs. Dean*, 113 Mass. 297, the defendant, after verdict for the plaintiff, discovered that one of the jurors on the panel which rendered the verdict was the husband of the plaintiff's niece. The court said: "The evident object of this enactment is that the question whether the jurors summoned can impartially try the case shall be ascertained and determined before the trial proceeds. A party against whom a verdict has been rendered, who has not seasonably availed himself of the means of inquiry thus afforded him, may indeed, upon proof to the satisfaction of the court that a juror did not

stand indifferent, by reason of facts unknown to the party until after the verdict, be granted a new trial or review at the discretion of the court; but he is not entitled to it as a matter of law, and has no right of exception if it is refused," citing authorities. See *State vs. Congdon*, 14 R. I. 458.

The conversation between the plaintiff's husband and the said juror was of short duration and in the public waiting room at a railroad station in the presence of numerous witnesses. It does not appear that the cause between the parties was mentioned or that any attempt was made to tamper with the juror. In his rescript the court said: "The court is of the opinion that neither the relationship nor the conversation in any way affected the result arrived at by the jury, and feels that the motion for a new trial on this ground should be denied."

The defendant excepted to the admission of the following testimony given by the plaintiff: Q. Can you state whether or not there was a rumor or has been a rumor—strike that out, please—can you state whether or not, Mrs. Hathaway, there has been a rumor in and around Slocum's as having originated with your sister to the effect that your children were not fathered by your husband? A. Yes, sir. Q. And had that rumor been called to your attention on more than one occasion before July 4th, 1920? A. Yes, sir." Rumor has even less probative value than hearsay which has the merit, at least, of stating that the author of the tale which is repeated. The effect of this testimony is not only that there had been a rumor that the plaintiff's husband is not the father of her children, but also that it is rumored that the gossip had its origin with the defendant. The admission of this testimony was error and was prejudicial to the defendant. See 16 Cyc. 123.

Defendant also excepted to the testi-

mony to the effect that the defendant had at some time between six and ten years before the time alleged in the declaration stated that the plaintiff's husband was not the father of one of her children. Such testimony was too remote to be admissible as it did not appear that the defendant had thereafter habitually made similar statements up to within a reasonable time before the date alleged in the declaration.

Plaintiff's exception is overruled, said exceptions of the defendant to the admission of testimony are sustained and the case is remitted to the Superior Court for a new trial.

For Plaintiff: Huddy, Emerson & Moulton.

For Defendant: Benjamin W. Grim.

SUPREME COURT

Ida Hurvitz

vs.

Harry Hurvitz

} Ex. &c. No. 5623

OPINION

(Heard Before Barrows, J., Below

STEARNS, J. The original proceeding is by a petition for divorce and included therein is a prayer that petitioner be awarded the custody of a minor child and an allowance for support, of petitioner and said minor child out of the estate of her husband, Harry Hurvitz. In the Superior Court, on motion of petitioner, the respondent was ordered to pay petitioner's attorney a certain amount for counsel and witness fees. A decision for divorce was later given in favor of the petitioner, with the custody of the minor child and an allowance for support of petitioner, and her child. To this decision exceptions were taken and the cause is in this court on respondent's bill of exceptions.

The petitioner now moves in this court

that she be awarded additional counsel fees. This motion is made on the theory that as the cause is now in this court an appeal and as the papers in the case are also here, the Superior Court for the time being has lost all jurisdiction of the subject matter. This assumption is incorrect. By Section 6, Chapter 273, General Laws, 1909, it is provided that the Superior Court shall have exclusive original jurisdiction, except as otherwise provided by law, of petitions for divorce, separate maintenance, alimony and custody of children. The Superior Court is thus made the divorce court of the State with exclusive original jurisdiction. The proceedings in divorce are purely statutory (*Sammis vs Medbury*, 14 R. I. 214; *Warren vs. Warren*, 36 R. I. 167) and by Section 1, Chapter 289, General Laws, it is provided that the practice shall follow the course of equity so far as the same is practicable. The establishment and development of rules of practice are thus left to the court with the power to adopt such procedure, either in law or equity, as is best fitted to accomplish the purpose of the statute. Certain rules have now been established. An appeal does not lie from a final decree in a petition for divorce. *Fidler vs. Fidler*, 28 R. I. 102. An appeal does lie from a decree on a petition for alimony, filed after the entry of a final decree in divorce. *Wilford vs. Wilford*, 38 R. I. 55; *Phillips vs. Phillips*, 39 R. I. 92. A petition for divorce is a "civil action" within the meaning of that phrase as used in General Laws, Chapter 298, Section 8. to this extent, that legal questions which arise during the trial of a cause are subject to review in this court upon bill of exceptions. *Thrift vs. Thrift*, 30 R. I. 357. In the *Thrift* case it was also held that the entry of final decree in a divorce cause is equivalent to the entry of judgment therein and that exceptions consequently will not lie after the entry of final decree. *Baker vs. Tyler*, 28 R. I.

152. Section 14, Chapter 247, provides that the Superior Court may regulate the custody and provide for the education, maintenance and support of children of all persons divorced by said court or petitioning for a divorce; may in its discretion make such allowance to the wife out of the estate of her husband for counsel fees, in case she has no property of her own available, as it may think reasonable and proper; and the court may make all necessary orders and decrees concerning the same and the same, at any time, may alter, amend and annul for sufficient cause after notice to the parties interested therein. By Chapter 1532, Public Laws, 1917-1918, Section 5, Chapter 247, General Laws was amended and express power to amend, alter or annul at any time decrees for the payment of alimony was conferred upon the Superior Court. The Superior Court has exclusive original jurisdiction of the matter of allowance for counsel fees, alimony and support of children. As orders for such payments are based on the necessity of the wife or children and as such orders are expressly made subject to change at any time by the Superior Court to meet the changing conditions of the parties or their children, it is manifest that the jurisdiction to make a necessary change must exist and continue in the Superior Court or the Supreme Court. The latter court acts in these matters simply as an appellate court to review alleged errors of the Superior Court in specific rulings and decisions. The transfer of the papers to this court does not deprive the Superior Court of its jurisdiction. If needed at any time the papers can be returned temporarily to the Superior Court upon application made to this court. All such matters in divorce as require adjudication pending the decision of the appellate proceedings, continue within the jurisdiction of the Su-

perior Court and are to be heard and decided by that court.

The motion for additional counsel fees should be made in the Superior Court. The motion in this court is denied without prejudice to the right of petitioner to bring a similar motion in the Superior Court.

For Petitioner: Philip C. Joslin and Ira Marcus.

For Respondent: Bellin & Bellin.

SUPREME COURT

Wallace L. Wilcox	} Ex. &c. No. 5594
vs.	
Frank H. Swan, et al., Receivers	

David P. Morris	} Ex. &c. No. 5595
vs.	
Frank H. Swan, et al., Receivers	

OPINION

(Before Sumner, J., Below)

RATHBUN, J. Each of these cases is an action of trespass on the case for negligence and involves the consideration of a collision between a street car operated by the defendants and an automobile owned by plaintiff, Wilcox, and operated at the time of the collision by plaintiff, Morris. Wilcox brings suit to recover for damage to the automobile and Morris seeks to recover for personal injuries.

The cases were tried in the Superior Court before the same justice, but with different juries. A verdict was rendered in favor of Wilcox for \$1859, and in favor of Morris for \$1439.50. A motion was made in each case on the usual grounds for a new trial. Said justice granted a new trial in each case.

Each case is before this court on an exception to the decision of said justice granting a new trial.

The accident occurred in the day time. Just before the collision plaintiff, Morris, attempted to drive from Elmwood avenue across the car track into a private driveway leading to an automobile service station conducted by plaintiff, Wilcox. Elmwood avenue is a wide street, which, at the place of the collision, runs in a northerly and southerly course. The traveled part of the highway between the street curb lines is about forty feet in width. Outside of the traveled portion of the highway on each side of the street is a single track which is located between the curb line of the traveled portion of the street and the sidewalk. On each side of the street between said street curb line and the car track is a strip of land about six feet in width upon which at varying distances from each other are trolley poles, electric light poles and trees. The track on the west side is caused for south-bound cars and that on the east side is used for north-bound cars. The collision occurred about two hundred and ninety feet south of Adelaide avenue, which intersects Elmwood avenue. At the point of the accident is a private driveway through the grass plot over the car track and sidewalk to an automobile service station conducted by plaintiff, Wilcox. When the plaintiff, Morris, turned the automobile from Elmwood avenue into this driveway the engine of the automobile stalled while it was crossing the track and an electric car, which was proceeding south, the direction in which the automobile was going immediately before it turned to enter the driveway, collided with the automobile which was stationary upon the car track. The plaintiffs contend that when the automobile stalled upon the track the electric car was a sufficient distance away to enable the motorman to avoid the collision by stopping the car and that his failure to do so was negligence. Plaintiff, Morris, the operator of the automobile, tes-

tified that he thought the motorman deliberately ran the electric car into the automobile. Neither Morris nor any other witness for the plaintiff could state what the motorman did or failed to do to stop the car. Several witnesses testified that the automobile without warning suddenly turned toward the driveway and drove upon the car track when the electric car was but a short distance away and that the motorman when the automobile turned toward the track reversed the power and apparently did everything possible to avoid the collision. The operator of the automobile when he attempted to cross the track had a clear view of the track for a distance of nine hundred feet. At the trial of the Wilcox case, which was tried before the Morris case, Rodman L. Nichols, an employee of said Wilcox, was called to corroborate the testimony of Morris that the electric car was a considerable distance away when the automobile stopped upon the track, but in view of the variation between his testimony given at the first trial and his testimony one week later at the second trial, we think said justice was justified in finding that his testimony was untrustworthy. Said justice considered that the story related by plaintiff, Morris, was improbable. In his rescript the justice said: "The story of Morris is improbable, viz: that a motorman in full view of an automobile standing on the track at a distance of from, say, 530 to 310 feet, should continue on his course, making no effort to stop the car until actually upon the automobile. The motorman had been in the service 11 years and his experience, we may fairly assume, would have deterred him from proceeding as Morris claims. * * * "The court feels that Mr. Morris was guilty of contributory negligence in driving his sedan upon the trolley track at a time when he knew, or ought to have known, that a trolley car was rapidly approaching

and that if any mischance, such as stalling his car, occurred, he could not escape a collision. In *Reddington vs. Getchell*, 40 R. I. 463, at 468, this court said: "Upon motion for a new trial made by a party who is dissatisfied with the verdict rendered by a jury, a justice who presided at the trial is justified in considering, and it is his duty to consider, the credibility of witnesses and what, in his view, is the preponderance of the evidence; if he believes the verdict to be unjust he should set it aside and grant a new trial."

After a careful reading of the transcript we find nothing which indicates that the trial justice was not fully warranted in granting a new trial in each case on the ground that the verdict was against the preponderance of the evidence.

Exception of the plaintiff in each case is overruled and each case is remitted to the Superior Court for a new trial.

For Plaintiff: McKenna & Boundreau.

For Defendant: Clifford Whipple.

SUPERIOR COURT

Max Applebaum
vs.
Merchants' Tailors' Trimming
House

No. 44015

RESCRIPT

SUMNER, J. Defendant has filed a motion for a new trial upon the usual grounds, and also urges that he has discovered new and material evidence.

This is a suit on book account, the jury bringing in a verdict for the plaintiff for \$1604.01. The ad damnum in the writ and declaration was only \$1200. There were four items in the account of the plaintiff. The last one was dated July 9, 1918, and was sold on four months' credit, which would bring the due date

on the 9th day of November, 1918, two days after the issuance of the writ in this case. Evidence on this latter item was introduced in the course of the trial without objection on the part of the defendant, although it had not been declared on.

The defendant filed with his motion for a new trial a letter from the plaintiff to the defendant accompanying the bill for this item of \$367.52, in which the plaintiff notes that the bill will be due on November 9, 1918.

Since the filing of the petition for a new trial, plaintiff has filed a motion to amend the ad damnum clauses in the writ and declaration by increasing the amount from \$1200 to \$1800. Plaintiff's attorney, Mr. Cooney, states in the petition that he was first called upon to conduct the case on the day of the trial, had no opportunity to familiarize himself with the pleadings, and so was not aware of the fact that the fourth item upon which he offered evidence was not included in the account and that the amount of the ad damnum was not large enough to cover all the items.

The plaintiff cites in support of his motion to amend the writ and declaration the decision in the case of *Eaton vs. Case*, 17 R. I. 430. The court in this case quotes *Taylor vs. Jones*, 42 N. H. 25, which held that the ad damnum may be amended after verdict when it is apparent from the declaration that it was left blank, or too small a sum inserted through mistake or inadvertence only; and if there has been a full and fair trial, without knowledge of the defect by either party, judgment may be rendered without a new trial; but if it does not appear that the defendant had no knowledge of the defect, the amendment may still be made, though a new trial must be granted to give him an opportunity to contest the enlarged demand.

In this case the ad damnum was not left blank, nor was too small a sum

inserted through mistake or inadvertence. The original attorney for the plaintiff, Mr. Casey, who issued the writ on November 7th, included all the items of the account that were due at that time and laid his ad damnum in an amount sufficient to cover them. The defendant's attorney was evidently aware of the defect, if it so may be called, but practically confined his attention at the trial to the question of the quality of the goods sold, although he did submit to the court a special finding upon the question of whether the fourth item was not due until November 9, 1918, the court refusing to allow this finding to be submitted to the jury.

The court realizes that the defendant's attorney did not in his conduct of the case or in his argument lay the stress upon the fact that the fourth item was not due that would ordinarily have been expected of a diligent attorney. He may have purposely refrained from doing this, feeling that he would have, in the event of an unfavorable verdict from the jury, an opportunity to present it later.

However, the fact remains that the fourth item was not due at the time the writ was issued and was not in the mind of the attorney when he drew the writ and declaration. If the jury had been composed of alert business men, they might perhaps have noted the fact that the item was not due and have brought in a verdict accordingly, but not being so composed and relying upon the claims of the attorneys in their arguments, they paid no attention to the fact whatever. The court feels that the ad damnum might properly be increased to an amount sufficient to cover the accrued interest on the first three items of the account, but plaintiff does not care to accept an amendment to the ad damnum fixing a less amount than that named in his motion. Accordingly the court denies the motion of the plaintiff to amend

the amount of the ad damnum named in the writ and declaration and grants the motion of the defendant for a new trial unless the plaintiff shall, in writing, within ten days from the filing of this rescript, remit all of the verdict in excess of \$1200.

For Plaintiff: Cooney & Cooney.

For Defendant: Bellin & Bellin.

SUPERIOR COURT

In Re
Estate of
Robert Forsyth } Eq. No. 203

RESCRIPT

TANNER, P. J. This is a bill in equity in which Clarence E. Eddy, trustee, under the will of Robert Forsyth, and the cestui que trust under said will ask that the house and lot mentioned in the first paragraph of the second codicil to the will of said Robert Forsyth shall be sold for better investment.

The Centreville National Bank and the Centreville Savings Bank, having been allowed to intervene, have filed an answer in which they claim that said Robert Forsyth and said Clarence Eddy were partners in the business named in said will, and that since the death of said Forsyth, said Clarence E. Eddy, individually and as trustee under the will of said Forsyth, has carried on said business; that said business was in legal effect a partnership between the said Clarence E. Eddy and the trust estate created by the terms of the will, which made said Clarence E. Eddy a trustee for himself and for said Robert Eddy in ownership of the real estate and said

business and its conduct; that said business is insolvent and the respondents are creditors of said firm, and that said real estate which is sought to be sold by said complainants is a part of the trust estate which is engaged in said business and subject to the creditors of said business.

This bill is heard upon exceptions to said answer.

The eighth paragraph of the will bequeathes the mill estate and the business to said Clarence E. Eddy and said Robert Eddy equally, and places said property in the control of Clarence E. Eddy until said Robert Eddy arrives at the age of 25 years, and makes provision for a devise over in case of the death of said Robert Eddy before his 25th year, and then says: "Knowing that my said business is more than self-sustaining, desiring to perpetuate said business for the benefit of those mentioned in the will, I hereby make it a condition of this devise and bequest that no mortgage shall be placed upon said mill estate by my said son-in-law in his own behalf, or on behalf of my said grandson, till said grandson shall have reached the age of 25 years."

The first paragraph of the second codicil which devises the real estate in question to said Robert Eddy says: "Whereas I did by the fifth paragraph of said will give and devise certain real estate to Charles A. Wilbraham and said Wilbraham having deceased, I now give and devise said real estate to Clarence E. Eddy in trust for my grandson, Robert F. Eddy upon the same terms and conditions of trust that are set forth in

said will relative to other devises to said Robert F. Eddy."

We do not think that the testator intended to make the real estate in question a part of the trust estate which was to be used in the conduct of said business. The fact that it was first devised to another party and does not appear to have been any part of the mill estate or used in connection with it indicates that it was not so intended.

The statement of the testator that his business was more than self-sustaining would indicate that he had no intention of making it subject to the debts of said business. We think a fair interpretation of the will and of the codicil is that the testator intended to make the real estate in question simply subject to the control of the trustee until the grandson should arrive at the age of 25 years, and to provide that it shouldn't be mortgaged before that time. If, therefore, it was not devoted to the uses of the business or subject to its debts, the creditors of this business cannot subject it to their debts. Neither do we think that there can possibly be any justifiable contention that a cestui que trust can be made personally liable for the debts of the trust business in which he does not himself participate, so that his other property which is not engaged in the trust business can be subjected to the debts of said business.

The exceptions are therefore sustained.

For Robert F. Eddy: Quinn & Kernan.

For the Banks: Thomas H. Clark and William J. Brown.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 30

APRIL 28, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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66 SOUTH MAIN STREET

Supreme Court Calendar

MONDAY, MAY 1, 1922

Ex5454 J L C	Edith G. Powell, p. a., vs. J. F. Gallivan et al.	W S F
Ex5577 PWG-P&S	Susan H. Graham vs Walter C. Nye et al	A G C
Ex5618 Atty.Gen	State vs John Whitford	M J T
Ex5555 J L C	George T. Stewart vs Mary F. Stewart	F & M
Ex5611ECS-DHM	Rocco Peretta & Co. vs Ventrone & Co., Inc.	P & D

WEDNESDAY, MAY 3, 1922.

Eq 535 H C C	G. W. Bugbee vs Stoller-Hilgers Silk Mills	PWG-ESC
Ex5558 M H & G	Mary J. Arnold vs Margaret M. Barrington	J H
Ex5556 C P S	State vs Rolf G. Adams	F&H-GRM
Ex5463 G F T	Roger Laudati vs Vincenzo Stea et al	W C H B
Ex5605 R & R	Max Berger vs Geo. E. Setchell	B & B
Ex5624 C R E	Daniel Kitchen vs Leon Rosenfeld	J L C
Ex5563 E C S	Maderight Mfg. Co. vs Max Charren & Son	R & R

FRIDAY, MAY 5, 1922

Ex5554 H M B	F. E. Sullivan vs Hope Publishing Company	F & H
Eq 547 Q&K-E&A	Mary E. VanAusdall et al for an opinion	
Eq 548 E C S	Centrexville Mfg. Co. vs Oswegatchie Textile Co.	C M B & L
M.P.373 S & H	Aquidneck Nat. Bank vs R. W. Jennings, G. T.	H A R

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MAY 1, 1922

Eq5403 P Romano	G. Fortis vs M. Colagrovanni	L V J
Eq4701 E & A	Central Union Trust Co. vs United Traction	
Eq5752 J P B	Max S. Pearl vs Samuel A. Pearl	R & R
51250 E & A	Waugregan Co. vs James C. Davis	E P Phillips
Eq5694 J A B	Robert Y. Scott vs Grace D. Knight	
Pet.337 Q & K	Nancy Simmons vs J. Samuels & Bro.	
Pet.339 J M S	R. E. Simmons vs J. Samuels & Bro.	

TUESDAY MAY 2, 1922.

Eq5792 G E & C	J. Ruperts vs Swiss Textile Company	N S C
Eq5809 P & S	Gladys L. Potter vs Antonio Ferrara	
Eq5279 G F T	Owen Gomersall vs V. Marzille	F H W
52506 J H M	Thomas McKenna vs Lederer Realty Corp.	F A J
52883 J H C	Mary A. Donahue vs Frank C. Pettis	F & H
46949 J H C	Florence E. Donahue vs Frank C. Pettis	F & H
Eq5091 McG & S	D. Basile vs V. Colaldo	
Kent H & S	J. S. Barnicoat, Jr. vs G. Fred Myer	

WEDNESDAY, MAY 3, 1922.

Eq51810 Lindem'h	J. H. Wall et al. vs A Eisenstadt
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Jury Trial Calendar

MONDAY, MAY 8, 1922

50146 Com & C	Peter J. Vandenberg vs Frank J. Dixon	McG & S
45487 R & R	Leo J. May vs E. Iannucci	Q & McK
51222 C & O'C	Joseph M. Bennett vs William McCreery	R T B
51628 C & O'C	Joseph M. Bennett vs Florence B. McCreery	R T B
45271 C Z A	Albert Prisco, p. a. vs Joseph McCormick	G M & H-P&S
45272 C Z A	Louis Prisco vs Joseph McCormick	G M & H-P&S
43248 F & H	Joseph F. Canavan vs James J. Whalen et al.	R & H
48240 C J O	N. Frances Burke vs E. Harris	A G C-B
47702 J L C	Charles H. Davis vs Martin L. Kernan	A B W
52428 F & L	Jackson Furniture Co. vs United States Tire Co.	J H
51010 R G E H	Charles H. Whipple vs Stephenson Mason	J R H
51016 J R H	Stephenson Mason vs Charles H. Whipple	R G E H
50805 B S & L	Sanderson Mfg. Co. vs E. E. Smith Co.	P C J
51630 P & DeP	John Vandetti vs Clara Robrick	A N P

TUESDAY, MAY 9, 1922

46005 R & R	Samuel Silverman vs J. T. Conroy	J P H
51717 T J D	Jennie M. Thomas vs J. Samuels & Bro., Inc.	W A G
50798 F & H	Rose A. Lynch vs Oscar Clothes Shop	C N W
52003 F & H	Jervil V. Cooper vs Grace C. Shanley	G E & C
52004 F & H	Robert Cooper vs Grace C. Shanley	G E & C
52005 F & H	Ethel Miller vs Grace C. Shanley	G E & C
52178 McG & S-V	Esther E. Aldrich vs Edward G. Fletcher, Adm.	W & G

52281 C & C	Bulah Brown vs William Chernick	C S S
50493 J J R-H	Nellie I. Rundell vs Ray Leighton	C Z A
50779 G & C	Frank J. Lee vs Williams & Merchant	P & S
52563 C R E	Jennie E. Pettit vs Treffe D.	H & S

WEDNESDAY, MAY 10, 1922

51242 R & R	Lena Feinberg vs Gulf Refining Company	T & L
51243 R & R	Raymond Feinberg vs Gulf Refining Company	T & L
51881 F & H	Elizabeth Burrows vs Paul Zuckerberg	Gunning
51882 F & H	Etta M. Steere vs Paul Zuckerberg	Gunning
51525 H A A	James Hargreaves vs John W. Yeomans	C & H
51871 W R P	Linwood A. Gardner vs Charles O. Marchant	M W C
52327 G & C	Catherine E. O'Meara vs N.Y., N.H. & H. RR. Co.	E G P
48320 T F F	William L. Johnson, p. a. vs Rhode Island Co.	C W
51892 J V	Dante De Ciccio, p. a. vs Hyman Koretsky et al.	P & DeP
P.A. 818 C M B & L	Ellwood J. Fisher vs Clif. R. Clapp, Ex.	E & A
52815 J G LeC	Sebastiania Andrade vs John J. Cunningham	P & S
52816 J G LeC	Aduarde Andrade vs John J. Cunningham	P & S

THURSDAY, MAY 11, 1922

48140 P & DeP	Angelina DiOrio vs David Gessen	Wildes
51247 C S S	Susia Pina vs Charley Pina	J G W
44598 A & A	Jasper Rustigian vs Sarkis Shamirian	I M
52080 Ziegler	Clara Gormley vs United Electric Ry. Co.	W
27066 B & W	Blair-Baker Horse Co. vs James Hennessey	W C & H
51540 P C J	Sam Kimel et al. vs Eva Bothkar	F & H
52135 T F V	City of Providence vs Haig Tapalian	T J D
52238 S J C	Timothy F. Kelly, p. a. vs John F. Fitzpatrick	
52069 T L C	George J. La Mountain vs James F. Sullivan	G E & C
52070 T L C	Lester La Mountain vs James F. Sullivan	G E & C
50123 S-M-B	Standard Nut & Bolt Co. vs Danforth & King M. Co.	W H McSoley
52890 C L C	Henderson A. Beal vs John Boyd	A G
47950 P & DeP	Annie Woodhead vs Annie Joost et al.	W S F

FRIDAY, MAY 12, 1922

ARBOR DAY—LEGAL HOLIDAY

District Court Appeals Calendar

MONDAY, MAY 8, 1922

48617 W A G	Z. Zarvatsjy & Sons, Ap. vs N.Y., N.H. & H. RR. Co.	Barnett-S
51810 P J Q	Frank A. Jenks vs Sarah A. Jenks, Admx., Ap.	Frost
51850 Slocum	Plain Street Garage vs Lyman E. Jones, Ap.	Kimball
51971 M & T	Peralia Bros. Co. vs Mer. T. & T. H., Ap.	B & B
44118 Stiness	Premont Winery, Ap. vs Antonio Gasbano	F & M
51980 McSoley	Michael-Bauer, Inc. vs Edward M. Doughty, Ap.	M W C
52020 Stiness	The Repub. Met. Ware Co., Ap. vs S. Jackson Co.	Easton
52100 W C & C	Theophitus F. Hamlin, Ap. vs Fred N. Nickerson	A. Gorman
49254 P & DeP	William A. Bushman, Ap. vs Rhode Island Co.	Kiernan
52577 Stiness	Sparks-Withington Co., Ap. vs Millers, Inc.	Wildes
52663 C S S	Oliver Caugnair vs Alfred St. Onge et ux., Ap.	A W S
48690 C & O'C	Charles J. La Fleur vs Al Berman & Son, Ap.	C M B & L
51358 J G (James Foriantaphel, Ap. vs Christopher J. Mullen	J T W
45344 R & R	R. I. Supply Co., Inc., Ap. vs Herman P. Goldberg	P C J-B & P
50903 Ziegler-K	The Atlantic Tubing Co., Ap. vs The R. I. Co.	W-S
51096 Slocum	Edward Wlknson & Co. vs T. F. Hunt Mfg. Co., (Ap.)	Bowen
52842 A & A J	Illustrated Current News vs Lorenzo Mont., Ap.	B C

52983 A & A	Prov. Stationary Co. vs P. Comras alias et als., Ap.	Q & McK
52098 M F C	Bernard A. Costello vs Jacob V. Rathenberge, Ap.	S S B
48226 T P C	Victor Houle vs Raymond Fries, Ap.	H-L
51569 Ziegler	Sanderson Bros. vs William A. Tryon Co., Ap.	J W G
36630 B C	Domenico Martino, Ap. vs Venenizo Zanni	J F C

TUESDAY, MAY 9, 1922

51559 A P J	Delphis Dugas vs Arthur Lavallie, Ap.	F P D
49304 Vance	Julia Farry, p. a. vs Nicolina Baronne	J C S
50713 T F V	Joseph Kulig vs Antoni Konofika, Ap.	J P L
51794 Slocum	H. C. Anderson vs Thomas W. Ferguson, Ap.	E G C
51657 West-Conaty	Albert w. Smith vs Nat'l Thrift Bond Corp., Ap.	G K & G
51981 Stiness	B. F. Goodrich Rub. Co., Ap. vs Willard M. V.-Co.	Grimes
52111 Stiness	C. Cretors vs John Sklavounes	Bannon
52228 McSoley	C. F. Adams Co. vs David P. Morris, Ap.	P C J
52297 G A B	Hartford B. Tingley vs Lecht Bros., Ap.	G H
52350 T G E H	J. A. Foster Co. vs Henry P. Bowen, Ap.	C & DeS
52574 J V	Vitor Matarese et ux. vs Pietro Carcatelli, Ap.	T F C
47878 E H Z	Luigi DiSegne vs Edward J. Day, Ap.	I M
52626 R G E H	The Fuller S. B. Co. vs William A. Tryon, Ap.	T J D
52629 F L O	Herbert A. Thayer vs J. B. Grenier, Ap.	W R P
52636 Stiness-M-B	James H. Tower Iron Wks. vs C. Morgan, Ap.	R W R
52771 J P B	The Hoefler-Fisher Co., Ap. vs Arthur B. Ladd	M W F
52351 L B & McC	Adelaid Plante, Jr., Ap. vs G. Clifford Howard	J E B
51381 S-M-B	James Thompson & Co. vs L. W. Bishop & Co., Ap.	Pro se ipso
52923 S-M-B	Endicott Johnson & Co., Ap. vs Louis Berick	F & M
52980 I S H	Morris Levine. Ap. vs McWright et al.	R & R
52981 L S	Flint-Adaskin Furn. Co. vs G. Schmaltz alias Ap.	J V M-R & R
49841 C S S	Met. W'sale Groc. Co., Ap. vs Leon Burtne	R & R
51973 J V	John DiOrto, Ap. vs Herman Rosner et al.	Jackvony
51970 McK & B	Herbert C. Anderson vs Albert De Meo	McG & S
52439 P & DeP	Vincent J. Oddo vs Peter Hayas, Ap.	F & F
53043 P & DeP	Nicolas Lombardi vs Mark Clougherty, Ap.	

WEDNESDAY, MAY 10, 1922

51562 A & A J	Industrial Appraisal Co. vs Kescot Mfg. Co., Ap.	G M & H
51923 Slocum	C. Perry White vs John Ashjian, Ap.	J R
51847 M & T	M. J. & H. J. Meyer Co. vs John Margullo Co., Ap.	P & DeP
50876 Alexander	Ray Leighton vs Neille I. Rundell, Ap.	J J R
51976 Slocum	J. Andrews et al. vs John D. Avidesian et ux., Ap.	Jenckes-J
51987 Stiness	A. Weiser, Ap., vs Providence Cabinet Company	R & R
51990 Slocum	Olney & Pratt St. Garage, Ap. vs Sumner Gordon	R & R
49832 McG & S	Marshall B. Martin vs Albert M. Hussey, Ap.	L F N
52372 E C S	Bramhall Deane Co., Ap. vs Bostonian Lunch	T F C
52436 J G LeC	Archie Royster, Ap. vs Michael Fernandes	J F C
52490 A B W	Clifford Howland vs John J. Hughes, Ap.	Owen
50552 McK & B	Charles E. Johnson vs Leon Rosenfeld, Ap.	R F O'N
52498 C L C	Sanderson Bros. vs Clayton A. Clark, Ap.	T F V
51364 J E B	Hugh P. Ferrari vs Eugene L. Baron et al., Ap.	W A G
51087 B & B	Soloman Karn vs Harold B. Congdon, Ap.	G A B
49041 B & W	John Ottone vs Frederick A. Marsden, Ap.	Wildes
48900 Stiness-M-B	American Electric Co., Ap. vs Millers, Inc.	McS
49353 D H M	Michael Mancino vs Gundenzio Cuccio, Ap.	P C J
52294 P & DeP	Camillo Mancina vs Florindo Rossi	J V
52060 J P F	Domenico DeLuglio vs Vincenzo Frazzino, Ap.	McG & S
52624 P & DeP	Antonelli Upholstering Co., Ap. vs Prov. Cab. Wks.	A West
52581 E H Z	George R. Robson vs Blue Rib. Line, Inc., Ap.	A West
52582 E H Z	Alfred W. H'ccaz vs Blue Rib. Line, Inc., Ap.	

THURSDAY, MAY 11, 1922

50361 P & DeP	Antonio Anastosi vs Yesar Daidarian, Ap.	T J D
50807 H-L	Harold B. Woodward vs Catherine E. O'Driscoll	F H W
48097 P & DeP	Michael Dorio vs David Gerson, Ap.	T F V
48227 J T W	Richerd Clark vs Walter L. Branaghan, Ap.	

51555 P & DeP	William Williams vs Wanskuck Co., Ap.	R T B
43392 R & R	George T. Solinger vs E. H. Baker, Ap.	Wildes
52054 Hicks	Nathan Sallinger vs Gregory Bousas	G & C
51986 Stiness	Stowers Pork P. & P. Co., Ap. vs Met. W'sale G. Co.	McG & S
52107 Breden	Wm. A. Huse & Son vs The Young Orch. Co., Ap.	T & C
52169 A & A J	Dayton Rub. Mfg. Co., N. Y. vs J. Gibbons Tire Co.	C H L
52214 M & Morgan	Chas. C. Peck, Ap. vs Frank E. Remington	G H & A
52215 Lawlor	John F. Galligan & Co. vs John Broadman, Ap.	McG & S
51673 P & DeP	Antonio Diano vs Onorato Vellene Ap.	J T C
46775 S S L	F. Tutalo et al. vs Michael Stokosa et al., Ap.	Hanley
52502 D H M	W. & H. Weaving Co., Ap. vs Charles A. Phillips	C W L
49854 Stiness-M-B	Jeanette Doll Co., Ap. vs B. & F. Novelty Co.	R & R
52218 J R D-Voight	J. R. Slubee et ux. vs G. Imbaglizzo et ux., Ap.	E & J
52578 R & R	Max J. Richter, Ap. vs Anna Osberg	D A C
52652 J E B	Sayeg Brothers vs Michael Hallock, Ap.	T F V
51100 R G E H	Jacob Cossock vs John T. Williams, Ap.	F & F
49286 W J H	John Conway vs Joseph L. O'Rourke, Ap.	J P B
49955 J B E	Everett D. Higgins vs John S. Perry et ux.	R W R
51696 J G C	Harry A. Warburton, Ap. vs Francis Kennedy et al.	T L C
52835 S N	The Post & Lester Co. vs Samuel Waldman, Ap.	R & R
52296 P & DeP	Guisepe Simcone vs Marietta Valente	W W O
49257 P & DeP	Angelo D. Pasquale vs John A'ello, Ap.	N H
52913 W S C H B-V	Louis Danella vs Royal Ins. Co., Ap.	L V J

FRIDAY, MAY 12, 1922

ARBOR DAY—LEGAL HOLIDAY

SUPREME COURT

Swinehart Tire &
Rubber Company

vs.

Broadway Tire
Exchange, Inc.

Ex. &c. No. 5564

OPINION

(Before Blodgett, J., Below.)

RATHBUN, J. This is an action of assumpsit to recover the balance of the purchase price of certain automobile tires and tubes. The trial in the Superior Court resulted in a verdict for the plaintiff for \$3540.97. The case is before this court on defendant's exceptions to the admission and exclusion of testimony, to the refusal of the trial court to dismiss the case, and to the refusal of the trial court to grant to the defendant a new trial.

It is admitted that the defendant is indebted to the plaintiff. There appears to be no question as to the price which

the defendant agreed to pay or as to the amount of goods delivered, but the defendant contends that it is entitled to recoup for breach of warranty.

The defendant contends that the damages awarded are excessive and that on this ground the defendant was entitled either to a new trial or a reduction of the verdict.

The first exception is to the refusal of the trial court to grant a new trial. The goods were warranted to be free from defects and merchantable. A short time after receiving the goods the defendant wrote to the plaintiff saying, "We are pleased with the goods." Five or six months later when payment was demanded the defendant complained for the first time that a portion of the goods were defective. The tires were encased in paper wrappers and could not be examined without removing the wrappers. The burden was on the defendant to establish a breach of warranty. It was a question for the jury to determine whether the goods were defective and

the jury were permitted to pass also upon the question as to whether the defendant within a reasonable time notified the plaintiff that the goods were defective. The jury evidently decided one or both of these questions adversely to the defendant. We think the jury would have been warranted in finding from the evidence that the goods were not defective and also that the defendant's complaint as to defects in the goods was not made within a reasonable time. G. L., 1909, Chap. 263, Sec. 9, provides: "But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise of warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor."

The defendant contends that it is entitled to certain credits which the defendant allowed to customer's in making adjustments relative to defective tires.

The contract between the parties contained the following provision: The First Party (defendant), as follows, to wit: To give the Second Party the privilege of making adjustments on defective Swinehart Tires in accordance with instructions to be furnished by the Home Office of the First Party. It is understood, however, that the First Party reserves the right to withdraw said privilege at any time by giving the Second Party notice of its intention to do so. In the event of any tires or tubes originally sold by the Party of the Second Part and later adjusted by the Party of the First Part direct to the consumer the Party of the First Part is to pass credit to the Party of the Second Part covering the difference between the Second Party's cost of said adjustment and the price collected from the consumer.

The "instructions furnished by the Home Office" were a part of the contract. Said instructions directed the defendant, on adjusting a claim with a cus-

tomers relative to a defective tire to make a detailed record of the facts; send a copy of this record to the Home Office not later than the following day and ship to the Home Office once in ten days the used tires on hand received from the customers in making adjustments. The defendant sent no notice or reports of adjustments; neither did he ship said used tires to the Home Office. He made no claim for credits for adjustments until after the plaintiff sought to collect the balance due the plaintiff.

The defendant contends that it should have been given credit for one-half of the money expended for advertising. It was agreed between the parties that the defendant would advertise Swinehart tires and that the plaintiff would credit the defendant with one-half the money expended in such advertising, but not to exceed either five hundred dollars or one per cent. of the net business received from the defendant by the plaintiff. The contract contained language as follows: "All such advertising to be submitted and approved by the party of the first part," that is, the plaintiff. No advertising was submitted to or approved by the plaintiff. The defendant having failed to submit the advertising to the plaintiff and thereby having failed to get said advertising approved by the plaintiff, the defendant was not entitled to credit for money expended for advertising. The trial court did not err in refusing to grant the defendant's motion for a new trial.

The eighth exception is to the refusal of the trial court to dismiss the case. When the testimony was concluded the defendant moved that the case be dismissed and argued that the plaintiff was a foreign corporation doing business within this State and attempting to enforce in the courts of this State contracts made within the State and that the plaintiff, not having appointed a resident attorney with power to accept pro-

cess, was barred from recovery by the provisions of Section 42, Chapter 300, G. L., 1909. There was no proof that the plaintiff ever did business within this State as contemplated by said Chapter 300. The plaintiff's salesman came to Providence and took an order for a bill of goods. The contract between the parties was executed by the defendant at Providence and by the plaintiff at its Home Office in Ohio. The contract was made in Ohio. The statute had no application. Furthermore, want of capacity to sue should be set up by a plea in abatement and is waived by pleading to the merits. *Weaver Coal Co. vs. Co-operative Coal Co.*, 27 R. I. 194.

We find no merit in the exceptions to the admission and exclusion of testimony and we find no reason for disturbing the verdict which has been approved by the trial court.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: Lyman & McDonnell and Arthur J. Levy.

For Defendant: Frank H. Wildes.

SUPREME COURT

Joseph Pennington	}	Ex. &c. No. 5602
vs.		
John D. Glover, et al.		

OPINION

(Before Hahn, J., Below)

RATHBUN, J. This is an action of trespass and ejectment.

In the Superior Court a trial by jury was waived and the justice who heard the cause rendered a decision for the defendants. The case is before this court on the plaintiff's exception to said decision.

On July 2, 1913, the premises in question were owned in fee simple by the plaintiff and his mother, Millie A. Pennington, one of the defendants. On said date the plaintiff and his mother by written lease leased said premises for a term of five years to defendant, Glover, and said Millie A. Pennington. Thereafter Millie A. Pennington conveyed subject to said lease her interest in said premises to the plaintiff.

Said lease contained a covenant as follows: "That at the termination of said period said lessors will execute to said lessees another lease to run for a period of five years, or in lieu thereof, will pay said lessees the appraised value of said improvements as said lessees may at their own expense have added to said premises."

The defendants, who did business as co-partners, paid the stipulated rent and occupied the premises during the full term specified in the lease. At the end of said term the defendants continued to occupy and pay the same rent as theretofore until March, 1920. Until the latter date nothing was said or done by the parties relative to "another lease" or the payment for the improvements which had been placed upon the premises by the defendants. On March 31, 1920, the plaintiff gave the defendants notice in writing to vacate the premises on or before July 2, 1920. The plaintiff in March, 1921, told the defendants that he would pay to them the value of the improvements which they had placed upon the premises, but nothing was done to ascertain what the value of the improvements was.

The defendants contend that by the terms of the covenant above quoted the plaintiff was bound at the end of the term, either to pay for the improvements or renew the lease for a term of five years, and that as the plaintiff did not, either before or within a reasonable

time, after the expiration of said five years, pay or offer to pay for said improvements the defendants became tenants for another term of five years. In other words, a new tenancy with the same terms of five years was created by the plaintiff's failure to elect whether he would pay for the improvements or renew the lease.

The plaintiff seeks to place a different construction upon said clause. He contends that the words, "another lease to run for a period of five years," does not mean another "lease with the same terms." He argues that the provision for executing "another lease" is nugatory and void for indefiniteness since said provision merely provides that the lessors shall execute "another lease" and fails to define the terms of such other lease. The plaintiff contends also that the defendants by remaining in possession and paying rent after the end of the term became tenants from year to year and therefore subject to being disposed after notice of three months in writing to vacate at the end of year. See Sec. 3. Chap. 334, G. L. 1909.

The question arises whether a new tenancy with the same terms for five years was automatically created when the defendants held over their term and the plaintiff failed within a reasonable time to elect to pay for said improvements. It should be borne in mind that only the plaintiff had the right to choose whether he would pay for the improvements or execute "another lease," and that had "another lease" been tendered it was optional with the defendants to accept or reject the new lease. "A covenant to renew, in the absence of a covenant to accept, confers a privilege, which is an executory contract, and until the exercise of the privilege by the party upon whom it is conferred he cannot be held for the additional term." * * * "And the fact that a covenant of renewal is binding only upon the lessor does not

deprive the lessee of electing whether he will enforce or decline the renewal." 24 Cyc. 995. As the defendants never became bound to pay rent for another term of five years it follows that they never acquired the right to occupy for another term of five years.

The defendants have never applied to the equity court for specific performance and we cannot in this action determine what, if any, equitable rights they now have. So far as this action is concerned we find nothing to distinguish this from the ordinary case where a tenant for a year or more holds over his term without a new contract with the landlord and thereby becomes a tenant from year to year unless the landlord elects within a reasonable time to hold him as a trespasser. The tenancy from year to year was terminated by a notice to vacate as required by Section 3 of said Chapter 334.

The plaintiff's exception is sustained.

The defendants may, if they shall see fit, appear before this court on the 26th day of April, 1922, at 10 o'clock a. m., and show cause, if any they have, why judgment should not be entered for the plaintiff.

For Plaintiff: Tillinghast & Collins.

For Defendants: Thomas L. Carty.

SUPREME COURT

Iona Specialty Company	}	
et al.		
vs.		Equity No. 532
May Go'dshine		
et al.		

RESCRIPT

(Before Tanner, P. J. Below)

This an appeal by the respondent. William Goldshine, from a decree of the Superior Court, whereby he was enjoined by preliminary injunction from manu-

facturing or selling confetti, paper horns, etc., within the State of Rhode Island until further order of the court.

The original bill was brought against May Goldshine, a daughter of the respondent, William, to enjoin her from manufacturing or selling confetti, etc., in this State and upon her failure to appear in court a preliminary injunction issued against her. Later certain other persons were made defendants and in a hearing on the matter of the preliminary injunction against these parties, William Goldshine appeared as a witness, and after giving his testimony, on motion of the complainants, said William was made a party respondent and subsequently, upon hearing had, the preliminary injunction was issued against him also. The proceedings were somewhat informal and lacking in regularity and the Superior Court, upon having the state of the record called to its attention by the attorney for William Goldshine, announced its readiness to dismiss the proceedings temporarily against him. The respondent, William Goldshine, however, preferred to proceed with the hearing on the preliminary injunction with the understanding that certain technical irregularities were to be cured later by complainants. Having proceeded to a hearing on these conditions the respondent is not now in a position to object to such irregularity. The result, however, is that the record as it comes to us is somewhat confused; but after an examination of the entire record we are of the opinion that it does not appear therein that there was error on the part of the trial justice in granting the preliminary injunction against William Goldshine.

The following facts seem to be fairly well established: The respondent, William Goldshine is a man seventy-three years and age and his daughter, May, is now about twenty-eight or twenty-nine

years old. Some ten years ago the respondent, William, testified that he sold his business in this city to his daughter, May, who was at that time some eighteen or nineteen years of age. She then began the business of making confetti and similar products. The father is unable to state with any clearness how or where his daughter secured the money to purchase the business. He says that he became her general manager, received no fixed salary from her, but occasionally got a little money and that he had no interest in the business after this time. In the year 1920, William Goldshine began negotiations with the complainants to sell to them the confetti business. In July, 1920, the business was sold to complainants under a written agreement between May Goldshine and the complainants for six thousand dollars. Part payment was made in cash and the balance of three thousand dollars was made payable in twelve monthly instalments of two hundred and fifty dollars for each of which a note was given by complainants. William Goldshine was present throughout all of the negotiations for the sale. There is some evidence that the sale was effected by the representations of the father and daughter that the daughter was the sole owner of the business. The cash was paid to the daughter, but the notes were made payable to the father, who now claims that this was done by mistake and that the notes should have been made payable to the daughter. As a part of the agreement of sale and as an inducement therefor May Goldshine agreed with complainants that she would not engage in the business of manufacturing or selling confetti in the State of Rhode Island for a certain term of years. Shortly after this transfer of the business the respondents moved to New York and in the spring of 1921, William Goldshine started in to manufacture confetti in New York. Shortly thereafter William Goldshine em-

ployed certain makers of confetti, who had before that worked in Providence for his daughter and who had continued after the sale of the business to work for the complainants, to make confetti in the city of Providence for him. He then began to do business with certain old customers in the city of Providence. It appears that his daughter had visited these customers, but the respondent claims the visits had no connection with the business, which was later done with them. His explanation is that he simply sent the goods to these people without having received any orders from them on the theory that he supposed they would be out of this particular kind of goods and that they would take his goods if they wanted them. It thus appears that, at the time these proceedings were begun, the Goldshines, one or both of them, were manufacturing and selling confetti in Providence. There is no record in this case, but from the very brief report of the decision of the trial justice, contained in the transcript of evidence, it seems clear that the trial justice considered that there was ample ground for the issuance of the preliminary injunction, either on the ground that May Goldshine was conducting business in New York now under the name of her father or that William Goldshine had been carrying on business in Rhode Island under his daughter's name and was still continuing to carry on the same line of business in New York and in Rhode Island under his own name. If either of these assumptions later is proven to be true or if the father and daughter have a common interest in the business, we think that there is sufficient evidence on a preliminary hearing to warrant the issuance of the injunction. There is evidence that the complainants supposed they were buying the business carried on by the Goldshines and, as a partial consideration for the purchase, for a limited time the Goldshines were not

to enter into competition with them in this State. This was the basis of the sale which apparently was made on representations of both father and daughter to this effect. It is true that the written agreement was entered into with the daughter only, but if this was made in bad faith and to deceive the complainants, whereas in fact the daughter was acting really for and in behalf of her father, we see no reason why he should not be bound by her agreement. If the parties are aggrieved by the continuance of this injunction it is possible for them to obtain a prompt hearing on the merits. In fact, the preliminary injunction was entered November, 1921, and, so far as appears, no effort has yet been made to have the cause heard on its merits. In view of all the circumstances we are of the opinion that the preliminary injunction should continue in force until a hearing can be had upon the merits.

The respondent's appeal is dismissed, the decree of the Superior Court is affirmed, and the cause is remanded to the Superior Court for further proceedings.

For Petitioners: Ira Marcus.

For Respondents: Bellin & Bellin.

SUPERIOR COURT

Martha E. Haynes

vs.

Albert L. Greene

} No. 50644

RESCRIPT

BARROWS, J. Heard on demurrer to all three counts of a declaration in case for malicious prosecution and malicious abuse of process.

The declaration formerly has been before this court and the Presiding Justice overruled a demurrer upon the same grounds to counts 1 and 2. The first two counts, therefore will not be considered, but for the sake of the record at

this time, the demurrer to the first and second counts is overruled.

When the matter was formerly before the court, a demurrer to the third count was sustained and plaintiff was given leave to amend, which she has now done. She seeks to avoid the objection then sustained to the third count as a count for malicious prosecution by claiming said count as amended is one for malicious abuse of process.

If the count is good for malicious abuse of process, the grounds of demurrer thereto because there is no allegation that the former action was groundless and that it had not been terminated, are not well taken. These grounds would be good against a declaration for malicious prosecution, but allegations of termination of the proceedings and that the action was groundless are not essential in cases for malicious abuse of process.

32 Cyc. 542.

The gist of the count as it now appears before us is that on the 30th of October, 1920, and subsequent thereto, Martha E. Haynes was the owner of real estate in Burrillville; that she lived outside of and at a considerable distance from Rhode Island and was in ill health; that defendant, Albert L. Greene, knew these facts and intended to take advantage of them and in order to take advantage of her sickness and absence and to compel her to lose her title and harass her, if she should desire to sell her land, maliciously caused to be issued out of the Superior Court on October 30, 1920, a writ attaching the real estate of said Martha Haynes in an action of assumpsit, returnable on December 1, 1920, in which the ad damnum was \$3000; that the writ was served on November 4, 1920, duly entered in court with the declaration on December 1, and that said Greene maliciously intended to avoid

trial if the said Martha Haynes appeared and contested such suit; that he maliciously intended to continue the attachment; that Martha Haynes entered an appearance in said cause and that she had the same assigned for trial on May 12, 1921; that at such time the case was called and that said Greene suffered a non-suit to be entered against him on that date, which was followed by judgment on May 28, 1921, by means of all of which actions the attachment on the real estate was maliciously continued from November 4, 1920, to May 26, 1921.

It is evident plaintiff has not alleged a series of attachments such as were condemned as abuse of process in *McNally vs. Wilkinson*, 20, R. I. 315, or in *Remington vs. Hazard*, 23 R. I. 143. Her present count as a count for abuse of process is even weaker than the original count, which appeared before Judge Tanner, in which it was stated that Greene well knew that he had no cause of action. As far as the present count goes, there is an implied admission that Greene had a good cause of action for which the attachment was issued.

Johnson vs. Read, 136 Mass. 421 (1884).

This case also contains the best definition which we have found as to the gist of an action for malicious abuse of process.

"The common law action for abusing legal process is confined to the use of process for the purpose of compelling defendant to do some collateral thing which he could not lawfully be compelled to do."

See also *Jastram vs. McAuslan*, 31 R. I. 278 at 282-3.

We find nothing in the allegations in any way to show that an attempt was being made to force Martha E. Haynes

to do any collateral thing which she could not lawfully be compelled to do.

Frequent repetition of the word malicious applied to Greene's course of procedure in the suit described in the third count can not make actionable acts which he had a legal right to do. We are of opinion the count can not be sustained as one for malicious abuse of process. As it is clearly defective as a count for malicious prosecution for reasons before stated, it follows that the count has no merit and demurrer thereto must be sustained.

For Plaintiff: W. G. Rich.

For Defendant: M. D. Chaplin.

SUPERIOR COURT

Frank Petrucci

vs.

The New York, New Haven
and Hartford Railroad
Company

No. 50706

DECISION.

BROWN, J. The plaintiff recovered a verdict of \$5000. The defendant has filed a motion for a new trial, alleging various grounds therefor, but at the hearing urged only one, viz.: that the damages are grossly excessive.

The accident occurred at the Dexter Street crossing of the defendant's road, in the City of Providence, June 14 1921, about 8:20 A. M. The plaintiff was engaged in peddling ice. At the time he had a wagon loaded with damaged, or "smoked ice". This ice he obtained from the Providence Ice Co., which had recently suffered a fire in one of its ice houses and was selling the ice at \$1 a ton. The plaintiff had on a load of 3500 pounds, which was drawn by one horse. He was on the westerly side of the track and had to go up grade to cross. There was a

gate on the easterly side of the track which was shut when the plaintiff reached the foot of the grade. The gate tender opened the gate, called to him to "go ahead" and at the same time motioned. The plaintiff looked in both directions, saw no train and started to drive across. "I saw a train," he testified, "when I was right in the middle of the track; it was coming backwards"; going towards Providence on the easterly track. I tried to get out when I saw the train backing up towards me. The gate came down and caught me right in the chin." A curve in the track is what probably obstructed the plaintiff's view of the train.

In the circumstances of the accident there is only one ground on which the defendant reasonably could urge a new trial, and that is excessive damages.

The plaintiff was on the seat, over which was a canvas cover supported by iron rods. The plaintiff testified that when he was caught by the gate in the chin: "I banged my head against those back logs and it throwed me back onto the rest of the seat and I hurt my back against the back-rest. We have a back-rest on the seat and the poles comes right up and throwed me."

Q. Was the seat damaged any

A. Yes, sir; it broke the top right off, a piece of iron thicker than my finger, and it took it and broke it right through."

The horse stopped. "I came down then and was still dizzy. I put my hand to my head and stood there against the back wheel about ten minutes.

He also testified: "They said, 'Will you be able to go on?' and I says I think I will be able to go on."

The cross-tender "laughed at me, that's all, he didn't say a word."

The plaintiff testified that after the

accident he got on his wagon himself to drive away, and drove right to Dexter Street; the first stop was at the State Armory; the horse stopped to drink. "I got dizzy" while the horse was drinking. After a while "I felt pretty good and I went down and I stood there for a few minutes." I then went right through to my house, No. 67 Spruce Street. I tried to deliver some ice but I could not. "I felt dizzy in the head and had pain in my head and I couldn't lift the axe to cut the ice." "I went right to bed and I don't know anything else."

He testified: "I was in bed two weeks steady and then I went up and down" for four weeks, and that while in bed I "had a bump on the back of my head where I banged it on the chunks of ice and I had a bruise in the front of my forehead"; that his back was hurt just above the hip on the spine, that he had a little black and blue on his right shoulder, and that "I always felt nervous. That's all."

"I shake, my legs shake like this. Everything is shaking. I am nervous and I cannot hold anything."

That he has done nothing since the accident, and that it cost to repair the broken cover over the seat \$16.

Dr. James P. McKenna who attended the plaintiff testified he visited the plaintiff June 14, 1921, and "found him bruised quite considerably." "I found a lump of the size a little bit larger than a hen's egg on the back of his head, and he had symptoms of concussion of the brain, and an injury to the sacro-iliac joint, and he also had internal injuries." He further testified that plaintiff was confined to his bed continuously for two weeks; that he attended him every day the first two weeks and then the next two weeks every other day; that he had nervous shock which comes with concussion of the brain, which was still present

when he last saw the plaintiff at the end of sixteen weeks after the accident.

Q. So that, Doctor, your treatment ran for a period of about sixteen weeks altogether?

A. I rather imagine that would be a good time for those injuries. I may have discharged him sooner than that, but with the impression that he had permanent injury there that would extend twelve or sixteen weeks.

The plaintiff testified that he has done nothing since the accident, but there is no evidence that this is due to the injuries received.

His income from selling damaged ice in which he made a profit of \$24 a day could have lasted only four or five days longer because the Providence Ice Co., of whom alone he could obtain damaged ice, stopped selling it at that time. After that he could make only \$14 or \$15 a day profit selling ice. Allowing \$24 a day profit for five days and \$14 a day profit for the balance of four weeks, or for 23 days, while he was unable to peddle ice, and \$16 for replacing the canvas cover to his seat, we find a financial loss of \$458. He was unable to peddle ice only about four weeks.

There was no evidence of expense for medical attendance.

The verdict indicates an allowance by the jury of about \$4500 for pain and suffering.

The amount is clearly grossly excessive.

The plaintiff will be adequately compensated for his financial loss and pain and suffering if he recovers \$1500.

If within ten days the plaintiff remits from the amount of the verdict \$3500 and accepts judgment for \$1500, a new trial is denied, otherwise granted.

In case of a new trial the same shall be limited to the question of damages alone.

For Plaintiff: Rosenfeld & Hagan.

For Defendant: E. J. Phillips.

SUPERIOR COURT

in Re
Assignment of } Assignment No. 174
Joseph Najarian }

RESCRIPT

TANNER, P. J. This is a petition in which the petitioner, Nugurditch Khoharian, recites that one Souren Najarian and Joseph Najarian, as co-partners, made a note in the amount of \$400 to said petitioner secured by chattel mortgage on the partnership business; that said Joseph Najarian made an assignment for the benefit of creditors; that the assignee has sold the partnership property for the sum of \$118.50, wherefore the petitioner asks that said assignee may turn over the said amount collected by the assignee.

It appears that the mortgage was one for a present consideration and was therefore valid though made within four months of the assignment.

22 Cyc. 1291

As one of the partners abandoned and gave up the business to the one who had made the assignment, the assignment, would be valid. Inasmuch, therefore, as the mortgage is valid and not dissolved by the assignment, the petition is granted.

In Abraham Sapovitz vs. Arthur L. Smith, Eq. No. 2232, this Court held that even a mortgage for a pre-existing indebtedness would not be avoided by a statutory common law assignment. We held that, while the word "Lien" is often used to include a mortgage, the strict legal meaning is that it was not the result of an express contract but was given by implication of law and did not there-

fore include a mortgage. We thought that the Legislature intended to use the word "lien" in its strict legal sense, since Chapter 338 of General Laws 1909 intends, to deal with common law assignments in which a debtor could take advantage of the displeasure which a debtor naturally feels when there is some proceeding against him.

James vs. Mechanics' National Bank et al., 12 R. I. 460.

Chapter 338 did not, therefore, contemplate the avoidance of a preference given by the debtor himself which neither he nor his assignee could avoid at common law, and said chapter did not intend to give the assignee power to avoid such preference by the debtor but that if the debtor or his creditors desire to do this, they must take proceedings under Chapter 339.

For Petitioner: Jasper Rustigian.

For Respondent: G. W. Bennett.

SUPERIOR COURT

Belle Stanton McLaughlin } Div. No.
vs. } 13658
James McLaughlin }

RESCRIPT

BLODGETT, J. Heard upon motion of petitioner for leave to discontinue her petition for an absolute divorce filed on March 22, 1922, after a decision of this court granting her petition and before the expiration of six months after entry of decision. Decision granting petition was entered September 27, 1921, and the decree granting same makes reference to a stipulation entered into between the parties to said petition, under which stipulation alimony was fixed at \$20,000 payable in a certain manner—partly upon entry of decision and partly upon entry of a final decree in same.

At the hearing upon said motion it transpired that the provisions of said in-

terlocutory decree had been carried out in part.

Sec. 4, Chapter 291 General Laws, provides that plaintiff in any cause shall not have the right to discontinue the cause after the trial shall have been begun to the court, but the cause shall proceed in the discretion of the court and decision be taken therein.

The motion in question was fixed after the decision.

The question before the court now is as to the status of the cause. Is the same still pending?

Sec. 19, Chapter 247, General Laws, provides that no decree (of divorce) shall be final and operative until six months after the trial and decision.

Until the entry of a final decree the Superior Court has exercised jurisdiction, *Murphy vs. Murphy*, Div. No. 11920.

It would seem that this court must have jurisdiction until the entry of a final decree, and after such entry this court has exercised such jurisdiction. *Berger vs. Berger*, Div. No. 10741.

In the opinion of the court the cause is still pending and the motion to discontinue is directed to the discretion of the court.

A motion for entry of a final decree has been filed and the parties can be heard at time motion is set down for hearing.

In its discretion the court denies the motion for a discontinuance.

For Petitioner: James G. Connolly.

For Respondent: Fitzgerald & Higgins.

SUPERIOR COURT

KENT, Sc.

Town of Warwick

vs.

Patrick A. Smith et al.

RESCRIPT

BARROWS, J. Action of trespass on

the case for negligence after recovery against the town by one Williams. The writ is dated August 6, 1921.

Second plea: that the cause of action set forth in the declaration did not accrue within two years before commencement of said action.

The declaration is in three counts.

The first contains the date when the injury occurred to Williams on a public highway through the negligence of defendant, Smith, and the statement that judgment was secured against the town and execution taken out on June 28th, 1921, and payment made thereafter by the town.

The second and third counts contain no date except the date on which the accident occurred. We assume the plea is to each count. It was so argued. Two years is the extent of the Statute of Limitations in such actions of trespass on the case for negligence. The second and third counts contain nothing to show when the cause of action accrued. We may surmise the plea is untrue, but we cannot say on demurrer that such is the fact.

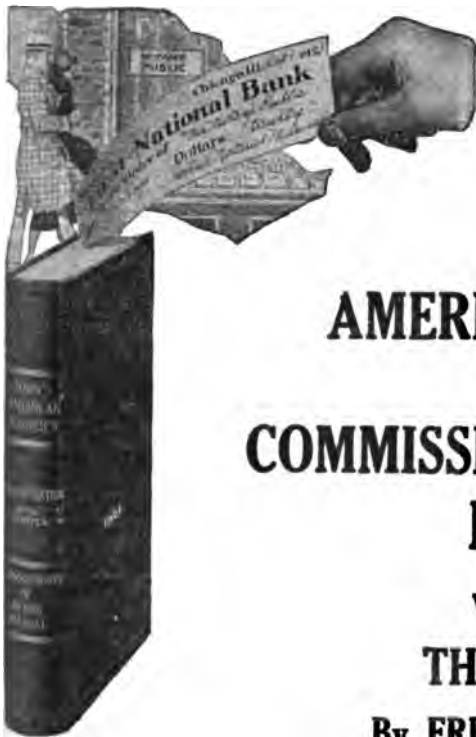
In the first count the facts are fully set forth, showing payment on or after June 28, 1921. The cause of action by the town against Smith did not arise until payment was made.

22 Cyc. 98.

17 Ruling Case Law, 765.

The plea, therefore, as to this count is not an averment of fact upon which issue can be joined. It is an argumentative denial of the facts stated. It is evident from the facts on record that the cause of action accrued within two years of commencement of this suit and a plea obviously false cannot be used to raise that issue to be determined by the jury.

The demurrer to the plea to the first count is sustained. It is overruled as to the second and third counts.



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No. 31

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**Address All Communications to the R. I. Law Record, 518 Howard Building
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Supreme Court Calendar

MONDAY, MAY 8, 1922

Ex5616 E C S	Northwestern Chem. Co. vs Millers, Inc.	F H W
Ex5619 EPBA-CCR	Macbeth Evans Glass Co. vs Millers, Inc.	F H W
Eq 545 Atty. Gen.	State of R. I. vs Frank W. Coy. Real Est. Co., et al.	W & G
Eq 546 J H C	Oriette Lowe vs C. E. Angell et al.	D H M
Eq H E & M	Ind. Trust Co., Ex. and Tr. vs M. E. B. Gardner	Q & K
Ex5607 R&R-DCA	M. Greenstein vs Morris Rosenstein	
Ex5588 J F H	Josephine Macchia vs J. H. Ducharme	A & A
Ex5611 ECS-DHM	Rocco Peretta & Co. vs Ventrone & Co., Inc.	P & D

WEDNESDAY, MAY 10, 1922

(Last Day)

Ex5539 C R E	Agnes Hennessey et al. vs Daniel Hennessey, Gr.	C & M
Ex5623 PCJ-IM	Ida Hurvitz vs Harry Hurvitz	B & B
Ex5626 C & C	F. Librandi vs A. P. O'Keefe	& C
Ex5551 C & C	Joseph Percelay vs Jencks Spinning Co.	C A W
Ex5577 P & S	S. H. Graham vs W. C. Nye et al.	A G C
Ex5454 J L C	Edith G. Powell, p. a. vs J. Gallivan et al.	W S F
Ex5547 J L C	Angelo Grande vs Eagle Brewing Company	M & S

Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MAY 8, 1922

PA790 C C & McC	Sullivan Mowry vs Lavina Mowry	J L C
Eq5773 S K & S	C. B. Mears et al. vs Countess Eleanor Moroni et al.	
Newport S K & S	B. Dexter Aldrich et al. vs S. H. Brownell	C C R
Eq5744 L & McC	Roy F. Wilkins vs F. B. Williams	Champlin
Eq5811 C M B & L	Benj. Rich vs Hackett Products Co., Inc.	
Eq5816 W P	John M. Gilman vs H. C. Caswell et al.	
Eq5818 E & A	Jenckes Spinning Co. vs T. F. McMahon et al.	
Pet.337 Q & K	Nancy Simmons vs J. Samuels & Bro., Inc.	
	(Barrows, J.)	
Pet.339 J M S	Rachael E. Simmons vs. J. Samuels & Bro., Inc.	
	(Barrows, J.)	

TUESDAY, MAY 9, 1922

50730 E & A	W. H. Titus vs Providence Buick Company, Inc.	
Eq5615 McK & B	Hilaire Brule vs E. Brule	
Eq4282 Carty	Catherine Wolk vs Jacob Yablonsky	McG & S
Eq3980 J M G	C. M. Walsh vs Ann'e M. C. Denny	F & H
Eq5813 P & D	Maria J. Carnolo vs Felice Faziole et ux.	
Eq4598 B L	J. A. Ricci vs C. P. Scheavino	P & D
Eq5809 P & D	G. L. Potter vs Antonio Ferrara	
Eq5279 G F T	Owen Gomersoll vs V. Marzelle	F H W
Eq5091 McG & S	D. Basile vs V. Colaldo	
Kent H & S	J. S. Barnicoat, Jr. vs G. Fred Meyer	
52134 P & D	William Maroni vs Eagle Star & Brit. Dom. Ins. Co.	

WEDNESDAY, MAY 10, 1922

49162 G H & A	M. L. K. Lalondi vs Leonide Lalondi	
Pet.341 S I J	A. Corria et al. vs Fink Brothers	H & S
Eq5822 A & A	R. Archambault vs Bridget Carroll	

Jury Trial Calendar

MONDAY, MAY 15, 1922

51833 Johnson	J. F. C. McCarthy vs Mabel S. Rice, Admx.	C E S
49204 W A G	Abdallah Abraham vs William Nicholas	T P C
51524 W L F	Walter B. Frost & Co. vs Imperial Knife Co.	J P H
47848 E C S	Pier Brothers, Inc. vs Samuel Gauzer	F & H
48354 F & H	Samuel Gauzer vs Piel Brothers, Inc.	E C S
52251 R & H	F. & B. Suter vs E. M. Mix	L F N
52312 W C H B	Katherine Nesbit vs Harry Greestein	W R P
PA811 C C & McC	John W. Miller vs George H. Saillant, Admx., et al.	W H McS
PA781 F & H	Chas. J. Denniston vs Industrial Trust Co., Exr.	H E & M
52511 R & R	Daniel Johnson vs Anthony Ferrelli	J R H
52570 J C S	Antonio Circaro vs Shawmut Egg Company	R & R
50786 P C J	B. Flink & Son vs Samuel Ackerman et al.	
51998 O'S & C	George B. Syverson vs Warren A. Martin	E R W
51259 P & DeP	Cosmopolitan Trust Company vs John Tutalo	B C
45673 McG & S-V	Samuel Frank vs Pincus Wax	C & Cooney
51385 J V	Angelina Reis vs Mrs. Volls	B & B
51386 J V	Angelina Reis vs Emilia Madeira	B & B

TUESDAY, MAY 16, 1922

50612 W S F	George Gazoulis vs G. A. Mercurio & Co.	J H-L
50613 W S F	Grocers Baking Co. vs G. A. Mercurio & Co.	J H-L
51895 Bowen	John Tucci vs James A. Leddy	C A W
52036 Joslin	James Kaplan vs Frank D. Pettit	C R E
52136 F & H	George W. Peterson vs Charles Massud	
52137 F & H	George W. Peterson vs James Lonergan	T & L
46801 Boudreau	Lillian F. Brackett vs Harry C. Griswold et al.	T & L
46802 Boudreau	William H. Brackett vs Harry C. Griswold et al.	D E G
51418 B-P & DeP	John Pesce, p. a. vs James J. Judd	Q & K
52362 F J O'B	Mary Weise vs F. W. Woolworth Company	Q & K
52363 F J O'B	Charles C. Weise vs F. W. Woolworth Company	McG & S
49928 J Bell	Abraham Luff vs Hyman Frank	W R P
51198 J F H	Antonio S. Mendes vs Andrew Scotti	P C J
46588 L Semonoff	David Sock vs M. M. Rullman	L V J
52468 C & DeS	Giusta Alterie vs Anthony Ursillo	J E B
52422 B & B-H	Edward W. Vais vs John Pillette	C S S
52522 S-M-B	Gill Piston Ring Co. vs Fred Morris Co.	A G C
47975 W & G	William R. Walker & Son vs Harry Fulford	T F V
50446 C R E	R. Bruce Denare vs Robert C. Wallace	M F C
52739 J E B	Henry C. McDuff Estate vs Thomas F. Reid	L & McC
52806 J E B	Walter L. Kelley vs Edward Beaudette	L & McC
52807 J E B	Walter L. Kelley vs Edward P. Beaudette et al.	Pettine
47981 Veneziale	Carmela Petterut vs Liberata Ursillo	L V J
50640 P & DeP	John Salvati vs Placido Caparone	L V J
50641 P & DeP	Luigi Salvati vs Placido Capatone	

WEDNESDAY, MAY 17, 1922

49650 W A G	Helen Zuckerberg vs Ohio Farmers Inc., Co.	F H
43683 JJH-PCJ	Cadillac Auto Company vs Frank C. Pettis	G J S
48115 W S F	Delia Bishop vs William S. Fitts	C N W
48116 W S F	Fred Bishop vs William S. Fitts	C N W
52121 E C S	No-Leak-O Piston Ring Co. vs Millers, Inc.	Wildes
47183 A & R	Meyer M. Graubart vs Harris Yaffe	A & A
47954 P & DeP	Angelo Gemma vs Giovanni Bat'sta Ciolfi	
44708 C & Cooney	Antonette Fascia vs Angelo Simone	P & DeP
52544 F & M	William Wahl vs Globe Coal Company	F & S
52369 W & G	Lidia C. Daneker vs N'hwestern Mut. L. I. Co.	G H & A
52370 W & G	Lidia C. Daneker vs Aetna Life Ins. Co.	C H & A
PA772 T P C	Louise White vs John E. Gill	F & H
46809 E H McC	Joseph Ladd vs Hyman Weisman	J C S
49519 C & Cooney	John F. Nelen vs Charles Wells	

THURSDAY, MAY 18, 1922

43530 D A C	George F. Gaffrey vs Alexander H. McKay	Chase-H
PA797 McG & S	Alice C. E. Ormsbee vs Olof Sundquist	H A C
50346 J P H	Imperial Knife Co. vs Am. Railway Express Co.	G H & A
47986 F & H	Oscar Johnson vs Walter L. Clark, C. T.	E S C
49864 C&B-BS&L	William T. Benson vs Max Kenner	J E D
52338 McG & S	Met. Wholesale Groc. Co. vs Abraham Davis	R & R
52260 C A K-Z	Genevive O'Brien vs John Shouras	G E & C
52366 T F V-B	Evangeline DeRoga vs Benj. W. Grossman et al.	S S B
51199 J F H	Edward Medway vs Antonio Pagliaro	J H DiS
50392 Stiness-M-B	George W. Chapin vs Central Warp Co. et al.	M F C
PA803 W H McS	Carl G. Kindberg et al. vs Ingeborg Kindstedt, Exr.	S & L
52656 A & A	Jean B. Vincent vs Lina Labelle	L P
52745 R & R	Wunsch & Swartz, Inc. vs Gussie Nelson	

FRIDAY, MAY 19, 1922

51835 Johnson	S. Chiappinelli vs C. & S. Mfg. Co.	B C
51869 H E & M	Elmer G. Sherman vs Henry J. Spencer	
51870 H E & M	Margaret G. Sherman vs Henry J. Spencer	
52078 A G C	L. Lormier Co. vs Clarabel Jenison	C C & McC
MP481 J Harris	Seneca Kettle vs City of Providence	E S C
50612 M & T	Corcoran Mfg. Co. vs Millers, Inc.	F H W
49918 S J C	Mary C. Sweeney vs S. J. Briggs Co., Inc.	L & McD
52420 E C S	Warner Sugar Refining Co. vs V. Vickarano	C M B & L
52474 C & C	Isola Tetreault vs Philip Berman	C M B & L
52475 C & C	Philean Tetreault vs Philip Berman	C M B & L
49860 W A G	James J. McKittrick vs George H. Bates	P & DeP
52326 C & H	William Hitchen vs Narr. Electric Ltg. Co.	J H-S
49290 H E & M	Lillian B. Atwood vs Harry Coy	P & DeP
52918 W & G	Marinus C. Tamboer vs Country Club Butter Co.	G H & A
52464 K H & F	Mary Toolan vs Penn Textile Company	T & L
52465 K H & F	Anna E. Toolan vs Penn. Textile Company	T & L
50435 J V-B	Antonio Paolantonio vs Alli Zura	McG & S

SUPREME COURT

Manual Simas
vs.
James J. Dugan

} Ex. &c. No. 5560

RESCRIPT

April 27, 1922

(Before Tanner, P. J., Below)

This is an action of trespass on the case against the former employer of the plaintiff to recover damages for personal injuries alleged to have been received in the course of the plaintiff's employment by the defendant through the negligence of the defendant.

The matter in its essential features has already been considered by us in Dugan vs. Simas, Equity No. 460, Rescript filed April 27, 1922. Dugan vs. Simas was an appeal from the decree of

the Superior Court entered on the petition of said employer, this defendant, brought under the provisions of the Workmen's Compensation Act. This court has reversed said decree and determined that the employer had elected to become subject to the provisions of said act and that thereunder the employee, this plaintiff, had waived his right of action at common law to recover damages for personal injury.

This action at law was tried before a justice of the Superior Court sitting with a jury, subsequent to the entry of said decree in the Superior Court but prior to the determination of the appeal by this court. The cause is here upon the defendant's bill of exceptions.

At the trial evidence was again presented upon the issue of whether or not said employer had elected to become subject to the provisions of the Workmen's

Compensation Act. It is apparent that the course of the trial and the rulings of the justice presiding were affected by the prior determination of the other justice of the Superior Court who had heard said petition of the employer.

When there is pending in the Superior Court both the petition of an employer under the Compensation Act for the determination of matters in dispute between him and his injured employee, and also a common law action of the employee against the employer to recover damages for the same injury, it appears to us that the proper practice would be to stay the trial of the common law action until there is a final determination upon the petition.

On May 3, 1922, at 10 o'clock a. m., the plaintiff may appear before us and show cause, if any he has, why an order should not be entered remitting this case to the Superior Court with direction to dismiss the same with costs for the defendant.

For Petitioner: M. A. Sullivan and Waterman & Greenlaw.

For Respondent: Knauer, Hurley & Fowler.

SUPREME COURT

James J. Dugan	}	Equity No. 460
vs.		
Manuel Simas		

RESCRIPT

April 27, 1922

(Before Blodgett, J., Below)

This is the petition of an employer, filed in accordance with the Workmen's Compensation Act, praying that the Superior Court decide the controversy between him and the respondent, his former employee, who had been injured in

the course of his employment by the petitioner.

The respondent in his answer admits that the petitioner filed with the Commissioner of Industrial Statistics a statement that he accepted the provisions of said act, but denies that the petitioner gave reasonable notice thereof to the respondent or that he posted, and kept posted, copies of said statement in conspicuous places about the place where his workmen and the respondent were employed.

Said petition was heard before a justice of the Superior Court, who entered a decree denying and dismissing the petition. The matter is before us upon the petitioner's appeal from said decree.

At the hearing in the Superior Court the controversy was entirely with reference to whether the petitioner had posted and kept continuously posted, copies of his statement accepting the provisions of said act.

Section 5, Article I, Chapter 831, Public Laws, 1912, known as the "Workmen's Compensation Act," was in force during the employment of the respondent by the petitioner and at the time of the respondent's injury. That portion of Section 5, which relates to the question before us, is as follows: "Section 5. Such election on the part of the employer shall be made by filing with the Commissioner of Industrial Statistics a written statement to the effect that he accepts the provisions of this act, and by giving reasonable notice of such election to his workmen, by posting and keeping continuously posted copies of such statement in conspicuous places about the place where his workmen are employed." By an amendment to the Compensation Act, passed and approved since the date of respondent's said injury, an employer who elects to become subject to the act is not required to post copies of his acceptance about the place where his workmen are employed.

It appeared in evidence before the Superior Court that the petitioner operated a stone quarry in Newport and that on July 27, 1916, the respondent, while in the employ of the petitioner at said quarry, and less than a week after beginning work, sustained an accidental injury arising out of and in the course of his employment. The petitioner testified that at the commencement of the respondent's employment, at the date of said injury and for a long time before and after, he had kept posted two copies of his statement of acceptance in conspicuous places, where the respondent was employed; that one of said notices was posted on the inside of the door of the tool house, where the respondent and the other workmen went to obtain and to return their tools; that the other was posted on the inside of the door of the shed where the workmen received their pay. Each of these doors opened outward and during all working hours was opened and swung back against the outside of the building to which it was attached, thus placing these posted copies directly within the view of all workmen at the quarry who passed in front of said buildings or went through said open doorways. The testimony of the petitioner was corroborated by that of four of his former employees, all of whom had particularly observed the posted copies, and one of whom testified that in 1915, the year before the accident, he had himself posted a copy to replace one that had been torn down. In contradiction of this evidence the respondent testified that he did not see the copies on said doors. He also presented the testimony of four other witnesses, who said that they worked at said quarry at the time of the accident to the respondent and that they had not seen said posted copies. The respondent and all but one of his witnesses testified through an interpreter and each said that he could not read English. Said doors

were removed from the buildings and at an adjourned hearing were brought before the Superior Court as exhibits. To one of these doors and alleged copy is still attached and appears to have been there for a long time. It is in testimony that the copy was torn from the other door shortly before the hearing. The place where it was attached is apparent, however, and some remnants of it still remain about the nails that are yet there. The justice very properly disregarded the respondent's testimony that the petitioner had not attempted to comply with the requirements of the act by posting two notices, which were at least partial copies of his acceptance.

From an examination of the notice posted on the door and exhibited to him the justice said that he could not see thereon the signature of the petitioner nor the date and for that reason alone, he held that the petitioner had not posted copies of his acceptance. Said door is before us as an exhibit and we have examined it. The alleged copy is on a piece of thick pasteboard attached to the door by large, flat-headed nails or tacks. The body of this notice was printed and, although now partly obliterated, there is no question that at the time of the respondent's employment it was an exact copy of the body of the acceptance. On this notice, as originally prepared, there were spaces in which it was intended that the date and the signature of the employer should be written. The sole question raised by the determination of said justice is as to whether the date and signature of the petitioner were on this notice at the time of the respondent's employment and injury. It was nearly three years from the date of said injury to the time of hearing. During that period said notice had been exposed to the action of the elements throughout the working hours at the quarry. As a result of such exposure the pasteboard had become

warped and its surface marred, weather-beaten and rough. Since the hearing in the Superior Court the notice has been kept under cover and no question is raised but that its condition is the same as it was at said hearing. In the circumstances it cannot now be determined by inspection whether or not thirty-three and one-half months before the hearing in the Superior Court the date and the signature, both written in ink, had been upon the notice. It is a matter of common knowledge that writing in ordinary ink exposed to storm, dampness and sunlight for a long period will corrode, fade and become obliterated. Furthermore, from what appears to have been the action of water running over said pasteboard, portions of its former surface have been removed together with the printed matter and whatever else may have been upon such portions. This is particularly true with reference to the space for signature where the original outer surface of the card has entirely disappeared.

There was no evidence before the Superior Court to support the finding that the two notices in question, which were posted on said doors throughout the period of the respondent's employment, were not exact copies of the petitioner's statement of his election to become subject to the provisions of the act and there was the positive testimony of the petitioner, who has not been impeached in any way, and whose credibility said justice does not question, that said notices were exact copies of said statement and that he himself signed them.

The Workmen's Compensation Act provides that the findings of fact of the Superior Court shall be conclusive and that a person, aggrieved by the final decree of that court, on an appeal to

this court is restricted in his appeal to a review of questions of law. In the early case of *Jilson vs. Ross*, 38 R. I. 145, at 150, the court said: "Under the Rhode Island Workmen's Compensation Act it is contemplated that the decision of the justice of the Superior Court and the decree of that court shall be based upon evidence and not arbitrarily made. If the record discloses that a finding of fact is entirely without legal evidence to support it such finding amounts to an error of law and will be reviewed by this court upon appeal and set aside." This construction of the act with reference to appellate proceedings has since been followed by this court.

The decree of the Superior Court dismissing the petition is reversed. In any further proceedings on this petition the question of whether the petitioner elected to become subject to the provisions of said act by filing a statement of his election and by giving legal notice of such election is concluded in favor of the petitioner. It appears in the transcript that by reason of a stipulation between the parties the respondent claimed that the scope of the hearing in the Superior Court was restricted. Nothing has been presented to us, however, which indicates that all the matters in dispute between the parties are not here for determination.

The cause is remanded to the Superior Court with direction to proceed and fix the compensation due the respondent in accordance with the terms of the act, and to enter its decree in accordance with this opinion and its determination as to the amount of the respondent's compensation.

For Plaintiff: Knauer, Hurley & Fowler.

For Defendant: M. A. Sullivan and Waterman & Greenlaw.

Verdict was for \$1000.

SUPERIOR COURT

John M. Anderson	}	Eq. No. 5320
vs.		
Adolf E. Johnson,	}	Eq. No. 5322
et al.		
Grant Pierce	}	Eq. No. 5323
vs.		
James F. Donovan	}	Eq. No. 5323
Grant Pierce		
vs.	}	Eq. No. 5323
Claus Hanson		

RESCRIPT

TANNER, P. J. These are three bills in equity brought by stockholders of the Narragansett Cotton Company, Incorporated, in behalf of themselves and other stockholders for the purpose of cancelling stock given to promoters and officers of the company for their services.

The first question to be considered is whether or not the complainants are entitled to bring the cases in this way. The ordinary rule is that they must first ask the corporation to bring the cases and can only bring them upon their refusal to bring them or where the officers of the corporation are so hostile it would be useless to have them bring the cases.

In these particular cases the corporation has already brought, and there are still pending, cases against two of these defendants for the same purpose. Those cases are now pending and injunctions have been secured upon them.

It appears, furthermore, that these cases were brought by the same counsel who have brought the present cases and that the cases brought by the corporation are not being prosecuted because counsel fears that there is an estoppel against the corporation which would not exist against the present complainants.

While we have some doubt as to the

standing of the complainants, we think it is perhaps their right to maintain the present cases, since perhaps if the corporation refuses to pursue their cases, it amounts to the same thing as if they had refused to bring them. We will, therefore, consider the cases upon their merits.

The defendants contend that not only the corporation but the present complainants are estopped to bring these cases since, in the first place, the entire stock of the corporation was issued to one Nord in payment for his formulas, options and contracts, and that he gave the stock to the present defendants directly, in pursuance of a contract to that effect.

Even if that were the entire meaning of the transaction, we doubt if the complainants would be estopped.

"The principle that promoters stand in a fiduciary relation to future subscribers for or purchasers of stock from the corporation is held or recognized in many other cases, and notwithstanding the decision of the Supreme Court of the United States above referred to, the prevailing rule undoubtedly is that, if promoters contemplating a future issue or sale of stock by the corporation, sell property to the corporation at a gross over-valuation, or otherwise receive a secret profit from the corporation, and stock is subsequently issued to innocent purchasers or subscribers as contemplated, the corporation itself, or such innocent purchasers or subscribers on its behalf, when they cannot obtain relief through, the corporation, may sue to recover such secret profits, or in a proper case to set the transaction aside and for other incidental relief; and it is no defence to such a suit that the promoters at the time of the transaction were the only stockholders, and that the corporation technically consented with full knowledge of all the facts"

The real meaning of the transaction, as apparent from the contract and what was done, seems to have been that the entire stock was issued to Nord in return for his rights to make the stock paid up, but that it was intended that the largest part of the stock should immediately become treasury stock for sale to the public, and that Nord should himself, retain only 1500 shares and should give a like amount to the other promoters, and should leave the remainder in trust for the corporation. The present complainants are the owners of treasury stock and we think should be treated as not being estopped by reason of the stock having first nominally been issued to Nord. This being so, they are in a position to question the validity of the issue of stock to the promoters. We think upon the facts that the stock was issued to the promoters for their past and future services. We find that these promoters rendered services to the company. It is admitted that each returned 500 out of the 1500 shares that each received.

The defendant, Claus Hanson, gave up his business and apparently his whole time for a number of months to the organization and starting of this corporation.

The defendant, Adolf E. Johnson also gave up a great deal of his time to the same purpose.

Considering the fact that the stock when it was given had no particular value and was wholly dependent upon the future success of the corporation, we do not feel able to say that it was so disproportionate to the services rendered that it ought to be cancelled.

As to the \$5000 worth of stock given to Adolf E. Johnson at a future time, apparently simply in recognition of his past services, we do not think that the directors had a right to make such a gift, and it ought to be cancelled.

As to the defendant, Donovan, the

stock was given to him for his services as fiscal agent. While he received commissions which were on the face of them large, the testimony indicates that only a small part of these commissions were actually received by him. He apparently gave up his whole time to selling the stock of the corporation and we do not feel able to say that he did not give sufficient consideration for the stock, and therefore his stock should not be cancelled.

As to the 800 shares of stock given to each of the Johnsons, when they first bought stock, we feel that this really amounts to having sold the stock at a discount. It is common practice to sell stock at large discounts when corporations are first organized and when there is no assurance as to success. We, therefore, do not feel that this bonus stock should be cancelled.

For Petitioner: Cushing, Carroll & McCartin.

For Respondent: McGovern & Slatery.

SUPERIOR COURT

Diadama F. Innan

vs.

Gilbert S. Innan, et als.

} Eq. No. 5848

RESCRIPT

BARROWS, J. Heard on bill, answer and oral testimony on an issue of fact.

The bill seeks assignment of dower in certain real estate, seisin and possession of which is alleged to have been in complainant's husband, Marcus M. Innan, at the time of his death, intestate, April 3, 1917.

The answer denies that Marcus M. Innan ever was seized of the real estate in question.

The facts are not disputed. The real estate was owned in fee by Paulina A.

Innan, the first wife of Marcus M. Innan, Paulina, and Marcus had a son, Gilbert, and a granddaughter, Carrie M. Greene, who was the daughter of a deceased child of Marcus and Paulina. Since the institution of the present bill, Gilbert has died, devising all his property to Clara B. Innan, who has been made a party to this cause.

Paulina A. Innan died April 14, 1912. She left a will in which she devised all her real estate to her husband, Marcus, and made no mention either of her son, Gilbert, or her grandchild, Carrie. This will was probated on the petition of Marcus after a waiver of notice signed by Gilbert and Carrie, who at the time were of full age. Thereafter, until his death, Marcus continued in possession and control of the real estate.

In August, 1913, complainant married Marcus, with whom she lived till his death. Just one month after his death, to wit, on May 3, 1917, an agreement (Exhibit 1), was made between complainant, Gilbert and Carrie, which recited that the three were the owners of the real estate and agreed that Gilbert should collect the rents, pay the bills and divide the balance between the three parties. This agreement was to remain in force so long as the parties were agreeable thereto. A falling out took place, respondents refused longer to share with complainant, and the present bill is the result.

It is admitted that there is no evidence in the will of testatrix Paulina's intention in omitting to mention her child and grandchild. Neither has any evidence of her intentions or acts been offered or any accident or mistake been shown.

Chapter 254, Section 22, General Laws of Rhode Island, 1909, reads:

"When a testator omits to provide in his will for any of his children, or for the issue of a de-

ceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless it appears that the omission was intentional, and not occasioned by accident or mistake."

Complainant urges that signing the waiver of notice of probate, permitting Marcus to remain in possession and signing the agreement by the three after the death of Marcus constituted a construction of the will of Paulina by the interested parties which shows that they recognized the omission of the child and grandchild to have been intentional, so that Marcus became seized of the fee under the will.

The important question is not what the parties afterwards recognized or thought, but what the testatrix intended. Of this we have absolutely no evidence. Nor is the agreement itself clearly such recognition of intention as complainant considers it to be. It was not made by Marcus but by his now widow and Marcus's child and grandchild, no one of whom so far as appears had the slightest knowledge of Paulina's intentions. It is far more likely to have arisen from mistake of law. It even may have been a voluntary division not required by law.

In the light of the statute we must find that upon the death of Paulina, her husband Marcus took no real estate under the will. Title to that estate descended to Gilbert and Carrie as tenants in common, subject to the courtesy right in Marcus. Marcus, therefore, was not seized of an estate of inheritance in said

real estate when he married complainant.

The complainant finally claims that respondents are not estopped by their laches from asserting that Marcus was not seized of the property. Seisin in Marcus can not be created by a negative act of respondents. Complainant's proposition that respondents have waited until after the death of Marcus, when it is impossible to prove Paulina's original omission of the child and grandchild was intentional, does not seem to us sound. We have no assurance that Marcus, if living, could or would have so testified, and if he knew such to be the fact and that his title was clouded by the omission, it seems to us the laches was his rather than respondents. If the omission was unintentional and the statute carried title to the respondents, they had no rights to possession of the property while Marcus lived and were not called upon to take any steps to assert their title. Laches is sleeping upon one's rights, and this can not be done until the right exist. Respondents' agreement with complainant might prevent their recovery of money paid thereunder, but it could not create an estate in complainant.

We have not been cited to any case where dower has been assigned out of an estate where the husband was seized by estoppel, if such a seisin can exist. The Massachusetts case of Shattuck vs. Gray, 23 Pickering 88, was one where the husband was seized in fee of land in which the widow was entitled to dower (p. 92). The only dispute was whether the parol assignment of it could be sup-

ported and the court held that after the patrol assignment, the assignor could not deny the existence of dower in the tract assigned. That seisin is the requisite to granting dower, see 1 Scribner on Dower, page 249.

We can find no ground upon which to support the bill, and decree may be entered dismissing the same.

For Plaintiff: Ball & Gorman.

For Defendant: Frank H. Hammill.

SUPERIOR COURT

Contrexville Manufacturing
Company

vs.

Oswegatchie Textile
Company

} Eq. No. 5113

RESCRIPT

BARROWS, J. The respondent corporation is insolvent and in the hands of a receiver. The present question arises on exceptions to that portion of the master's report disallowing a claim of Wendt Brothers for \$14,000 against said receiver.

The facts are not disputed. March 4, 1918, respondent corporation, hereinafter called, for the sake of brevity, Oswegatchie, engaged Wendt Brothers as selling agents for two years, and as a part of the consideration Wendt Brothers agreed to purchase stock in Oswegatchie with the proviso that if at the end of the two years Wendt Brothers ceased to be the selling agents, Oswegatchie would repurchase the stock for the price paid by Wendt Brothers. Pursuant thereto

Wendt Brothers purchased \$14,000 worth of stock. The transaction was entirely in good faith, Oswegatchie was solvent and the agreement was advantageous to both sides. At the end of the two years, by mutual consent, Wendt Brothers ceased to be selling agents and on March 25, 1920, they inquired about the return of the \$14,000. Oswegatchie did nothing, and on May 8th, Wendt Brothers demanded the \$14,000. May 17th Oswegatchie admitted the justice of the demand and about this time the officers of Oswegatchie, though acknowledging the obligation, said they could not then repurchase, but would do so in June (p. 19, Q. 54). In June a creditors' committee took charge of Oswegatchie and in August a receiver was appointed. At that time, and always thereafter, Oswegatchie had been hopelessly insolvent. There is no evidence that Oswegatchie was either solvent or insolvent in March or June, 1920. Wendt Brothers assumed the former and claim that the insolvency arose from subsequent large purchases which the business did not warrant. The receiver believes the evidence points more towards insolvency in the spring of 1920, and there is clearly some indication of this in the testimony. We do not believe the question is important for a determination of the case. If it be important, *McIntyre vs. E. Bement's Sons*, 146 Mich. 74 (1906), holds that insolvency must be affirmatively shown by the claimant. This has not been done. We are treating the case, however, on the assumption that Oswegatchie was solvent up to the time of the appointment of a receiver.

The contract to repurchase the stock

was valid.

Adams vs. New England Investment Co., 33 R. I. 193.

Garon vs. Credit Foncier Canadian, 37 R. I. 273.

These cases expressly exclude from the court's decision circumstances where the carrying out of the contract to repurchase would be injurious to creditors.

We have examined the authorities cited by counsel on each side and we can find nothing to support the claim of Wendt Brothers. The cases are unanimous in holding that a corporation's contract to repurchase its stock can not be enforced nor a claim for failure to do so be permitted, when by so doing the shareholder is brought into competition with general creditors. Neither good faith in the transaction nor solvency at the time the obligation arises to repurchase makes any difference. The question is whether at the time of enforcement the claim will compete with that of general creditors. Capital stock is in the nature of a trust fund for creditors and it can not be depleted and a stockholder transmuted into a competing claimant against the asserts of the corporation.

Of the numerous authorities those most like the present case are:

Matthews Bros vs. Pullen et al., 268 Fed. 827, 1st Circuit (1920).

Olmstead vs. Vance, Jones Co., 196 Ill. 236 (1902).

O'Gara vs. Maguire, 259 Fed. 935, Dist. Ct., N. J. (1919).

The exceptions to the report of the master are overruled.



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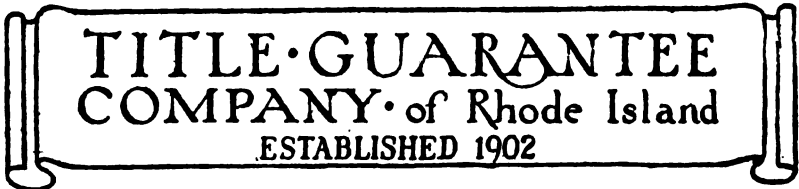
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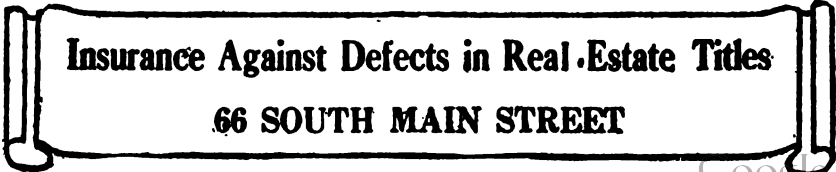
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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, MAY 29, 1922

Eq5831 E&A-GE&C	Crompton Co. vs W. H. Derrick et al.	
Eq5836 E&A-GE&C	Interlaken Mills vs W. H. Derrick et al.	
Eq5839 E&A-GE&C	Home Bleach & Dye Wks. vs T. F. McMahon et al.	
Eq5596 T & C	R. I. H. Trust Co. et al. vs James Degnan et al.	Q & McK
Eq5850 H E M	Providence Electrd Co. vs Nathan Eugene	
Assgt.177 H D B	In Re Assgt. of Thomas William Tague	
P.A.800 N W L	J. F. Bannon et al. vs A. M. B. Bannon	Cooney & C
53035 Cooney & C	Sandilla Riga vs Ansell R. Morrell et al.	G E & C
53036 Cooney & C	D. Riga vs Ansell R. Morrell et al.	G E & C
53037 Cooney & C	M. Pofi vs Ansell R. Morrell et al.	G E & C
Eq5851 B & B	M. R. & C. Frank, Inc. vs The Misses Frank	
Eq5645 B C	F. Paolino vs Nicola Russello et al.	
Eq5297 G E & C	A. V. Jenison vs H. W. Davenport et al.	
Eq5860 S K & S	George H. Lumb vs Athens Underwear Co.	
Eq5498 J B L	Jane V. Bailey vs Frank J. McDuff et al.	

TUESDAY, MAY 30, 1922
(Legal Holiday)

WEDNESDAY, MAY 31, 1922

Eq5844 O'S & C	M. G. Autron, Adm. vs Mary T. Cass et al.	
Eq5476 G F T	G. Tartgalia vs A. Pezzullo	J E Dooley
Eq5849 Woolley	Peter Dawson vs Frederick Maylos	
Kent H & L	J. S. Barnicoat vs G. Fred Meyer	
Eq5306 E & A	Sullivan Ballou vs Amer. Wringer Co.	

SUPREME COURT

J. E. Nichols }
Henry W. Mason & Co. } Ex. &c. No- 5532

RESCRIPT

(Before Doran, J., Below.)

This is an action of assumpsit on the common counts brought by J. E. Nichols of Clarksville, Texas, a shipper of cotton, against Henry W. Mason, a cotton broker and merchant of Providence, doing business as Henry W. Mason & Co., to recover the price of twenty-eight bales of cotton.

The case was tried before the late Mr.

Justice Doran and a jury and resulted in a verdict for the plaintiff. The jury also found specially that the defendant did not submit the plaintiff's type of cotton to arbitrators for arbitration. A motion for a new trial was made by the defendant which was granted by the trial justice.

The case is now in this court upon the bills of exceptions of both plaintiffs and defendant.

The plaintiff and defendant had had business dealings prior to the time the present controversy arose. The defendant ordered 425 bales of cotton of plaintiff's type "Fine" which, by direction of the defendant, were shipped to the Manville Company in this state. This latter

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company upon receipt of the cotton rejected a considerable part of the same on the ground that it was not up to their sample. The latter company had a standard type of cotton, which it called "Kim," samples of which were given to brokers to match when orders for the same were given by the Manville Company. From the evidence it appears that the practice in common in the cotton trade for shippers, brokers, merchants and mills to label it different kinds of cotton according to their fancy with different combinations of letters, usually four in number. The practice in selling also varies; at times the broker sells to the mills by a sample from a shipper, and at other times, as in this case, the broker or cotton merchant having a sample from the mills supplies cotton according to the sample furnished. Certain other shipments of cotton, made by the plaintiff upon order of the defendant to New

Bedford mills, were rejected by these mills as below sample. Plaintiff was notified by defendant of these rejections and defendant, by consent of the plaintiff, submitted the matter of the rejections to arbitration in accordance with the rules of the cotton trade. The arbitrators rejected 284 of 364 bales of cotton submitted to them for arbitration as below the standard, and the 28 bales of cotton, which are subject of the present suit, were thereupon shipped by the plaintiff to the defendant with instructions to the defendant to make replacement therewith for the rejected cotton. The plaintiff's claim, in substance, is that the 425 bales of cotton came up to the standard of the sample under which they were sold by the plaintiff, but that defendant attempted to sell plaintiff's cotton to the Manville Company for a higher grade of cotton than called for by plaintiff's sample and further that in the arbitration the

defendant fraudulently submitted to the arbitrators not plaintiff's sample but another sample of the Manville Company's "Kim."

The transcript is lengthy and the testimony is conflicting. A detailed analysis of th's mass of conflicting testimony is neither desirable nor necessary for the purpose of this inquiry, which is directed primarily to the question, was the decision of the trial justice, that the verdict of the jury was against the weight of the evidence, clearly erroneous? The trial justice in deciding upon the weight of the evidence properly must and should consider not only what a witness says but the proper value in his own judgment of the testimony. To determine the main issues in this case it was necessary to present the testimony of numerous witnesses in regard to various customs and methods in the sale of cotton. The principal controversy was in regard to the length of the staple of the cotton in question and certain samples and exhibits. In determining the length of the staple the decision is made in the cotton trade not by measurement by rule but by "pulling" the cotton, as the phrase is, that is, on the judgment of the person testing the cotton. The result of any one witness's opinion on this issue can not be accepted as conclusive; being opinion evidence it is entitled to weight in proportion to the qualification of the witness in regard to experience and the presence or absence of any interest in the case. The experts pulled various samples of cotton in the presence of the court and jury and in a number of instances got different results from the same samples. The trial justice, in determining the value of each expert's opinion, thus had a certain advantage which it is impossible for this court to obtain. To justify a finding that his decision on this part of the case is wrong, the evidence must be clear and convincing and it does not appear to be. Plain-

tiff claims that his cotton called "Fine" was 1 1-8 inches in length of staple. There is some evidence that it was less than th's. He further claims that the Manville Company's standard "Kim" was 1 1-4 inches long. There is evidence that although the Manville Company called their "Kim" 1 1-4 inches as a matter of fact it was really 1 1-8 inches long, or between 1 1-8 and 1 1-4 inches in length. Defendant and an employee of his, Mr. Sullivan, and other witnesses testify to this effect. Plaintiff agreed to submit the matter of rejections to arbitrators, which later resulted adversely to plaintiff's claim. Plaintiff claims that a sample of his cotton was not submitted by defendant but that the latter perpetrated a fraud upon him by substituting a sample of "Kim" for plaintiff's sample "Fine." This claim is based on inference. All of the direct testimony is to the contrary and is to the effect that a sample of "Fine" was submitted to the consideration of the arbitrators for comparison with a sample of "Kim" furnished by the Manville Company. The jury found in a special finding in accordance with the plaintiff's claim. This particular issue, as appears in the transcript, was regarded as the vital issue in the case. Clearly we can not say that the trial justice erred in his refusal to sustain this special finding. The trial justice charged the jury that regardless of the question of the arbitration if the plaintiff's cotton was not up to sample, either in quality or length, plaintiff could not recover in this action. There is some evidence that the cotton was not up to sample in quality, but what if any effect th's evidence had with the trial justice is not apparent as the transcript in short and general in the conclusions stated therein.

From the above references to some of the issues in the case, it is seen that the evidence in regard to the facts in issue was conflicting. The conclusion of the

trial justice is thus stated in his rescript: "An adequate consideration of this case leads to the conclusion that the verdict here is against the weight of the evidence." Upon consideration we cannot say that the decision of the trial justice to this effect is clearly erroneous and plaintiff's exception thereto is overruled. *Surmeian vs. Simons*, 42 R. I. 334.

Plaintiff's exception to the denial of his motion for the direction of a verdict is overruled. The evidence was sufficient to require submission of the case to the jury. During the course of the trial plaintiff took a large number of exceptions to various rulings of the trial court. These exceptions, although not expressly waived, were not pressed in oral argument. All of these exceptions are overruled. Plaintiff can not consistently claim that he is entitled to retain his verdict and at the same time claim that he has been prejudiced by adverse rulings, which did not in fact prejudice him. Although under authority of *Carr vs. American Locomotive Co.*, 34 R. I. 234, defendant could properly file his bill of exceptions, as the decision of the trial justice in granting a new trial is affirmed, the occasion for the consideration of defendant's bill of exceptions has not arisen and all of defendant's exceptions are overruled. The particular exception of defendant to the refusal to direct a verdict in his favor is waived by the action of defendant in moving for a new trial in the Superior Court and the granting of the motion by the trial justice. *Barstow vs. Turner*, 29 R. I. 100.

The exceptions of plaintiff and of defendant are overruled and the case is remitted to the Superior Court for a new trial.

For Plaintiff: John P. Beagan and J. J. Richards.

For Defendants: Waterman & Greenlaw.

SUPREME COURT

Arthur Burns, Sr., et al. }
vs. } Ex. &c. No. 5448
Wm. Brightman, et al. }

OPINION

Before Doran, J., Below.)

STEARNS, J. This is an action brought under the statute (Gen. Laws 1909, Chap. 283, Sec. 14) by Arthur H. Burns and his children, to recover damages for the death of Julia Burns, the wife of Arthur H. Burns and mother of the children, which is alleged to have been caused by the negligence of a servant and agent of the defendants.

After a jury trial which resulted in a verdict for plaintiffs for \$7000, and a denial by the trial justice of defendants' motion for a new trial, the case is now in this court on the defendants' bill of exceptions.

Mrs. Burns, while crossing Thames street in Newport, was struck by an automobile which was driven by one John H. Killian, and received injuries, which a few months later resulted in her death. It is admitted that the accident was caused by the negligence of Killian, but deny that he was their servant and agent.

The defendants Brightman and Chase, who were partners, had the exclusive privilege of soliciting for the passenger business on Commercial Wharf in Newport. At the time of the accident Killian was driving an automobile which belonged to the defendants and for which defendants held a license from the city of Newport to operate as a public vehicle. On the morning of the day of the accident, Killian went to the garage of defendants and later drove defendants' automobile to Commercial Wharf, where, upon the arrival of the steamer from Providence, he took certain passengers into the automobile and then started to

drive through Thames street and there ran over Mrs. Burns. Neither Killian nor the other occupants of the car were witnesses at the trial, and it does not appear that any particular effort was made to secure their attendance. Defendants claim that the automobile was rented by Chase to Killian for the day for his own use and that the occupants of the car were his friends. Plaintiffs claim that Killian was the servant of defendants, engaged in carrying on their business and there was evidence of certain admissions to that effect made by defendants. The latter deny making any such admissions. This issue was one of fact and the jury found that Killian was the agent of defendants and was acting within the scope of his employment at the time of the accident. The trial justice has approved this finding, and the evidence is sufficient to support the finding.

Exception is taken by defendants to a part of the charge to the jury in which the trial justice stated in substance that, as defendants had admitted the automobile was there, if no other evidence was produced this was a prima facie case which would warrant the jury in drawing the conclusion that the person in charge of the machine was engaged in the employment of defendants, but as the defendants had testified that Killian was not their servant and in their employ, this issue was to be decided upon consideration of all the testimony. The presumption referred to by the trial judge which made a prima facie case, meant simply that plaintiffs had introduced sufficient evidence to require defendants to present their case. This having been done, the jury was instructed to decide the issue upon all of the facts in evidence. There is no merit in this exception.

At the conclusion of the testimony defendants requested one court to direct a verdict for defendants on two grounds:

1, that there was no evidence that the driver of the automobile was the servant of defendants; 2, or, if he was their servant, that he was engaged in their business at the time of the accident. Defendants' exception to the refusal to direct a verdict is overruled. The evidence was conflicting on these issues of fact and the decision of these issues was properly left to the jury.

On the question of damages the court charged the jury that nothing could be given by way of solace for wounded feelings, or for the bereavement suffered, or for the pain and suffering of the deceased or for the loss of the society of the wife and mother; that the measure of damages was the pecuniary loss sustained, which was the present value of the net result remaining after the personal expenses were deducted from the income or earnings of the deceased; to ascertain this it was necessary to ascertain first the gross amount of such prospective income or earnings and then to deduct therefrom what the deceased would have expended as a producer to render the services or to acquire the money that she might be expected to produce, computing such expenses according to her station in life, her means and personal habits, and then to reduce the net results so obtained to its present value. This is a correct statement of the rule as established in *McCabe vs. Narragansett Electric Lighting Co.*, 26 R. I. 427, 27 R. I. 272; *Reynolds vs. Narragansett Electric Lighting Co.*, 26 R. I. 457; *Dimitri vs. Cienci & Son*, 41 R. I. 392.

To this portion of the charge defendants took an exception as follows: "to that portion of the charge which relates to the damages in which Your Honor charged the jury that the rule was that there should be deducted from the earning capacity the amount it would be necessary to enable the plaintiffs' interests to produce that income, on the ground

that there was no evidence of what it would cost her to produce that income." By this exception defendants do not apparently question the basis of the computation of damages, namely, the earning capacity of the deceased. The objection is not stated very clearly, but as exception is also taken to the refusal of the trial justice to grant a new trial on the ground that the verdict was against the law and that damages are excessive, we think the question is fairly raised as to whether plaintiffs have offered the necessary proof of damages to sustain the verdict.

The first question is, Does the statute provide for the recovery of damages for the death of a married woman, who at the time of the accident is not engaged in an income producing occupation but whose time and energy are devoted to the maintenance of her household and the care of her husband and children? We answer this in the affirmative. The claim is that as the deceased was a housewife and was not engaged in any gainful occupation, there was no pecuniary loss caused to her estate by her death; that it is not sufficient to establish the fact that deceased had an earning capacity at the time of her death but there must also be proof of an actual loss of income which deceased was earning at that time; that the services of the deceased, although of value to her husband, were rendered without expectation of financial return and presumably would continue to be so given until the end of her life and consequently her estate suffered no financial loss by her untimely decease. But why should this presumption be made for the

benefit of the wrongdoer? If the husband should die or become incapable of supporting his wife, the wife would then have to support herself. There is no presumption that the husband will survive his wife. The mere fact that the person for whose death the action is brought was not, at the time of her death actually engaged in accumulating property or earning an income does not bar the right of recovery. If this were a bar to the action, the representative or beneficiaries of a person who had given his services to charities or to the public would have no action. A construction of the act which led to such a result would, to a large extent, defeat the intent of the act. Under the common law the husband is entitled to the services of his wife and in return he is under the obligation to support her. Chapter 246, General Laws, provides that a married woman may carry on any trade or business as if she were single and unmarried, with the expressed exception that she cannot enter into any trading partnership with her husband. By this, and other statutes, the common law status of husband and wife has been much changed, although the effect of these statutes is not entirely to displace the common law. In *McElroy vs. Capron*, 24 R. I. 561, it was said that the intent of this legislation is to place the married woman substantially on the same basis as a single woman could maintain an action of trover against her husband for the conversion by him of her household furniture and other personal property. In *Phillips vs. Phillips*, 39 R. I. 92, the right of the wife to enter into a contract with her husband was affirmed.

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It thus appears that a married woman now in many respects is treated in law as if she were single. She is entitled to the benefit of her own earning capacity whenever she elects to exercise the right. In the absence of any such election her services will belong to her husband and he, not she, is entitled to sue for loss of such services. *Larisa vs. Tiffany*, 42 R. I. 148. As the earning capacity of the wife belongs to her individually and is, in a certain sense, her property, defendants should not be permitted to escape liability for the destruction of such property right by reason of the fact that the wife has seen fit for the time being to give her services to her husband and family.

The action is one created by statute and is based on a legal right which arises after death. The amount of the damages recovered is not assets of the estate and is not subject to the payment of estate debts or liabilities. Although, as held in *McCabe vs. Narragansett Electric Lighting Co.* and other cases cited, the amount of recovery is to be measured on the basis of the loss to the estate and not to the beneficiaries individually, yet the purpose of the act is not solely to enrich the estate of deceased as such, but also to provide for and distribute to the designated relatives of deceased a legal compensation for the loss caused by the wrongdoer. As the action is statutory, the construction of the statutes in regard to details not expressly provided for by the terms of the act, unless a contrary intent appears therein, should be in accord and in harmony with the other laws of the state. The pro-

vision that one-half of the damages shall go "to the husband or widow" indicates an intention to establish an equality in the right of action given to the widow or to the surviving husband. At the time of the enactment of the statutes, the majority of wives were not engaged in separate pursuits for their own enrichment and we see nothing in the act which requires such restrictions of its benefits as is claimed by the defendants. It is true that there is of necessity in many cases an avoidable lack of certainty in the exact measurement of the damages, but this is not a valid argument for the denial of any recovery at all. The uncertainty in regard to earning capacity and damages which exists in actions for the death of a minor, for loss to his estate after the time when he or she would have attained majority, is much greater than in the case at bar but the right to recover for such loss is established. *Dimitri vs. Cienci & Son*, *supra*.

Having come to the conclusion that there is a right of action given by the statute, we think the rule of damages is the same in this case as in other cases brought under the statute. As the right of plaintiffs to recover damages is based on the right of the deceased to use her earning capacity for her own benefit, we think for the purpose of fixing the damages the right of recovery upon the death of the wife should be the same as if she were a single woman, and that all of her necessary expenses in acquiring an income should be deducted from the total of her gross income. The present value of the net income is the correct measure of damages. Evidence of standard life tables and tables showing the present

value of a dollar for various terms of years was properly admitted. From the testimony it appears that such services as deceased performed in the household would, according to the prevailing rate of wages, cost from ten to twelve dollars and upwards a week. But there was no evidence of the expense the deceased would have to incur to produce her income; consequently, there was no sufficient evidence upon which real damages, as distinguished from nominal damages, could be computed.

There was no reversible error in the trial or in the charge to the jury, but we think the trial justice erred in his refusal to grant a new trial. Judged by the law as correctly stated to the jury by the trial justice, the plaintiffs failed to produce the proof essential to the legal ascertainment of damages. As the verdict thus lacks the support of the necessary evidence to sustain it, it is contrary to law and should have been set aside by the trial justice. Defendants' exception on this point is sustained. The other exceptions are overruled.

The case is remitted to the Superior Court for a new trial.

VINCENT, J., dissenting. By the majority opinion this case goes back to the Superior Court for the reason that the testimony presented to the jury did not furnish a sufficient basis upon which the damages could be properly assessed.

The cases of McCabe vs. Narragansett Electric Lighting Co., 26 R. I. 427; Reynolds vs. Narragansett Electric Lighting Co., 26 R. I. 457, and Dimitri vs. Cienci & Son, 41 R. I. 392, establish certain rules

which must be complied with in ascertaining the amount of damages to which parties would be entitled in certain cases.

The measure of damages is the pecuniary loss sustained. The law does not recognize such damages as being in the nature of a penalty for the commission of a wrongful act on the part of a defendant.

Under the rule fixed by the above cases it is necessary to show the gross earnings and the personal expenses. The net earnings may then be ascertained by deducting the expenses from the gross amount. Taking the net result thus obtained and finding the exception of life, the present value may be ascertained.

The plaintiffs in the case at bar offered testimony to the effect that a woman hired to perform the duties which devolved upon the deceased as a wife and mother would command a wage of fifteen dollars per week, but they failed to show anything as to her personal expenses and for that reason the majority of the court finds that the jury was without evidence indispensable to the proper assessment of damages.

I make no criticism of the before-mentioned cases either as to their requirements or their applicability to situation where a pecuniary loss has been sustained.

In the present case no actual pecuniary loss has been shown. The husband and next of kin of the deceased have joined in a suit to recover such damages as have resulted to her estate by reason of her death. They are persons pointed out by the statute as entitled to sue for the benefit of her estate and nothing more.

The deceased at the time of her death was fifty-four years of age. She was a wife and mother who, during her married life, had devoted herself to her husband and children. Her services belonged to her husband and not to her estate. It was her duty to work for him, a duty imposed by the marriage relation. On the other hand, it was the duty of her husband to support her. These reciprocal duties the majority opinion acknowledge. The services which she rendered could not increase her estate nor could her expenses diminish it. She had no personal expenses which she was called upon to defray and she could not earn anything by rendering the services to her husband. Any contract which she might make with him for compensation for such services would be void.

In this situation the majority opinion holds that the husband might die first and the wife would then be obliged to support herself or that she might quit her family and become a wage earner. This is pure speculation. It cannot be inferred that the husband would predecease and there is nothing in the testimony from which any reference could be drawn that the wife would desert her family and go forth to earn her own living.

There is no statute in this state authorizing a recovery except for pecuniary loss, the majority opinion to the contrary notwithstanding. The opinion says, "Does the statute provide for the recovery of damages for the death of a married woman, who at the time of the accident is not engaged in an income producing occupation, but whose time and energy are devoted to the maintenance of her household and the care of her husband and children? We answer this in the affirmative." Such statute cannot be pointed out. Therefore, for this court to say that a recovery can be had for the benefit of the estate of the deceased,

when the testimony clearly shows that no pecuniary loss has been or is likely to be suffered by her estate, amounts to judicial legislation.

The majority opinion says that the contention of the defendants is, "that the services of the deceased, although of value to her husband, were rendered without expectation of financial return and presumably would continue to be so given until the end of her life and consequently her estate suffered no financial loss by her untimely decease," and adds interrogatively, "But why should this presumption be made for the benefit of the wrongdoer?" The answer to that is two-fold. In the first place the damages recoverable are by way of compensation for pecuniary loss and not as a penalty for wrongdoing; and secondly, the only natural and reasonable presumption is that a woman fifty-four years of age who had always been devoted to her husband and family would continue to serve them, there being no suggestion of any intent or desire on her part to do otherwise.

Again the majority opinion says, speaking of a wife, "She is entitled to the benefit of her own earning capacity whenever she elects to exercise the right. In the absence of such election her services still belong to her husband and he, not she, is entitled to sue for loss of such services." She had never expressed, so far as appears, by word or act, the slightest intention or desire to avail herself of that privilege nor does it appear that she ever expressed any dissatisfaction with her situation and surroundings.

Other portions of the opinion might be discussed, but I think I have said enough to clearly indicate my views. I think the case should be remitted to the Superior Court with direction to enter judgment for the defendants.

For Plaintiff: Pettine & DePasquale.

For Defendants: Waterman & Greenlaw.



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PUBLISHED EVERY FRIDAY AFTER
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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JUNE 5, 1922

J.T.W.47702 J L C	C. H. Davis vs M. L. Kiernan	A B West
Eq5857 Appleton	D. E. Mowry et al. vs D. E. Mowry Company	
Eq5832 G W B	J. F. Spinnett vs Jason Spinnett	
Eq5864 Nathanson	A. W. Macker vs A. W. Macker Company	
Eq5733 A G	H. F. Flemis, 2nd vs Colorgraph Printing Co.	
Eq5143 C & C	Rae Sperra et als. vs M. Alice Sprague	C C & McC
Eq5850 H E & M	Providence Elect. Co. vs Nathan Eugene	
Eq5851 B & B	M. R. & C. Frank, Inc., vs The Misses Frank	

TUESDAY, JUNE 6, 1922

Eq5742 R & H	J. Baldwin et al. vs George F. Flaherty Company	
Eq5767 R & S	A. S. Merrill et al. vs R. I. H Trust Company, et al.	
Eq4598 B C	J. A. Ricci vs C. P. Schiavino et al.	P & DeP
Eq5015 G E & C	A. B. Bowden vs William T. Ide	J P B
44694 A G C	Wm. C. Johnson & Co. vs R. I. Motor Trucking Co.	
Eq4754 N W L	J. M. Magoon vs. J. S. Briggs et al.	W & G
Wash. W H W	T. H. Barber et al. vs C. A. Bates	

WEDNESDAY, JUNE 7, 1922

Eq5299 G F T	G. Waldo Parrott vs. S. A. Minkoff et al.	McG & S
Eq5690 Coon & C	J. D'Arcy et al. vs D. D. T. Metovier	
Eq5729 L & McD	Z. Sinda vs Joseph Sinda	T J D
Eq5651 P & DeP	G. Scoppio vs V. Cannella	E M S
Eq5861 Stiness	E. Bergquist vs R. I. Co-operative Store	
Eq5870 F & H	A. Radziwicz vs Z. Fidnch et al.	
Eq5862 Pettine	G. Equillace vs F. Squallan	
Eq5402 J B L	E. F. Hamilton vs Robert J. Steere	Pettine
Eq5866 Pettine	Ellen Pierce vs J. A. Pierce et al.	
Eq5810 B F L	J. H. Wall et al vs A. Erseistadt et al.	
Eq5873 G K & G	French Worsted Co. vs H. Samborst et al.	

Jury Trial Calendar

MONDAY, JUNE 12, 1922

52034 R & R	George Bush vs B. F. Steere, D. D.	C S S
49216 P & S	James E. M'thell Co. vs William M. Jette	A & A
50085 W H McS	George S. Bell vs Alexander Weines et al.	H E & M
MP441 J H	Fred A. Hill et ux. vs City of Providence	E S C
48517 E C S—M	Redbord Gabrilove & Co. vs Crown Clothing Co.	F H W
49440 W M P B	Leonilda B. Cipolla vs National Wholesale Groc. Co.	W C H B
48087 F & H	Annie Borland Admx. vs Narra. Elec. Light Co.	J H
43872 W H McS	Mary A. Lynch vs Ida S. Hopkins	W G & C
52450 G E & C	W. P. Hamblin, Inc., vs George H. Bates	E L J
52685 McSoley	Walter L. Nichols vs John Campbell & Co.	AS & APJ
49340 P & DeP	Felicia Silitro vs Michele Cornicelli	L V J
MP492 Q & K	In re Condemnation Certain Lands by City of Prov.	
49921 G E & C	Kenyon B. Ely Inc. vs George E. Clark	W J H

47570 S—M—B	Delia Stove Admx. vs The Irons & Russell Co.	R T B
49372 C & DeS	Teresa Petrone vs Harold Gates	L B & McC
52864 Q & McK	James J. Devlin vs Providence Gas Company	S K & S
52866 Q & McK	Adeline E. Devlin vs Providence Gas Co.	S K & S
51384 G H & A	Robt. Schwarzenback vs Mer. Tail. Trim. House Inc.	B & B

TUESDAY, JUNE 13, 1922

51404 P & DeP	Frank Tarentino p. a. vs Harry Collins	Jackvony
PA777 J P B—R	Clarence F. Woodworth vs Albert L. Woodworth	N W L
50770 W H H	Joseph Roy vs Salvatore Catangaro	J V
51901 F B C	Alice Frieden vs Henry Rhault	J G C
51902 F B C	John Frieden vs Henry Rhault	J G C
51217 W K McS	Bessie Czyzowski vs Mike Gregelewicz	W C H B
51218 W K McS	Albert Czyzowski vs Mike Gregelewicz	W C H B
51855 J H McG—L	Commonwealth Hotel Const. Co. vs R. F. Morse	W & G
51497 G S B—B	Vital J. Prezian vs Walter L. Clarke, C. T.	Eklund
51426 F & H	Joseph H. O'Neil, Jr. vs C. R. Herreshoff et al.	H E & M
48832 W H McS	Luigi Saccaccio vs Elma Di Biase	P & DeP
52095 C N W	Michael F. Costello, Admr. vs Lyon Harootunian	J R
51172 P & DeP	Pietro Piceino vs Antonio Abruzzese et al.	J V
50992 R J McM	William J. Franum vs John J. Lee	C M B & L
52509 M D C	Antonio Penta vs Antonio Marcaccio	C R E
50988 S—M—B	D. Strauss Co. Inc. vs Merchants Tail. Trim. House	B & B
45517 P & DeP	Andrea Santangini vs Concetta Marrocco	B C

WEDNESDAY, JUNE 14, 1922

51394 P & DeP	Salvatore DeLibero et ux. vs Planta. Const. Co.	Chaffee—B
50401 J R	Hampartoon Sahagian vs Israel Cosrofian	W M P B
46658 P C J	B. Flink & Son vs Met. Wholesale Groc. Co. Inc	McG & S
51320 R & R	Samuel I. Cohen vs Samuel Newberger	T H W
51546 R & R	Lena Adler vs Stanley Urnski	
51547 R & R	Reuben Adler vs Stanley Urnski	
50991 S—M—B	Lockwood Mfg. Co. Trustee vs Millers, Inc.	Wildes
52379 C N W	John R. Smith vs Harvey B. Brumsted	L F N
47564 C J B	John Sears vs A. Bernardo & Sons	R T B
49905 P J Q	Armelia G. Santos vs Manuel Buto	J O
52396 H D B	Sam Larkin vs Fardo Bragrentz	F & M
52396 H D B	Sam Larkin vs Ignatz Shilo	F & M
52421 P & DeP	Soscio Lombardi vs Giustino Rossi	
52657 F & H	Magloria Whalen p. a. vs Joseph Finnigan	F J D
52658 F & H	Patrick J. Whalen vs Joseph Finnigan	F J D
50249 J V	Cosmo Buttero vs Lena Taneburrino	P & DeP
50250 J V	Elizabeth Buttero vs Lena Taneburrino	P & DeP
50013 P & DeP	Lena Tamburino vs Elizabetha Buttero	J V
52825 J R	Charles Guiragos vs Annie Rosenberg alias et al.	McG & S
52917 R & H	Martin P. Wallace vs James Hamilton	P & S
48631 McG & S	Ida L. R. Reiner vs Nicholas F. Reiner	F & H
52787 Z—K	Walter A. Smith vs Esmond Mills	W A S
52942 L V J	James Moore vs Lawrence Marsden	J L J
52943 L V J	Lena Moore vs Lawrence Marsden	J L J
52944 L V J	Michael Porcaro vs Lawrence Marsden	J L J
44394 Jackvony	Michele Martino vs Vincenzo Esposito	P & DeP
52723 T L C	Michael J. Cavanaugh vs Frank J. Knappen	G M & H
53011 P & DeP	Constas Tanagis vs Gust Protulis	McG & S
53139 E H Z—K	Corinne Mortineau vs J. B. S. Brazeau	nil dicit

THURSDAY, JUNE 15, 1922

49324 Gunning	Aymor R. Sanderson et al. vs Ivan Desandorf	S S B
51207 A A C—J	Thomas Rick vs Thomas Colletta	G F T
52202 G H A	Morris Plan Co. of R. I. vs Samuel Backman	J S
52314 G H A	Benjamin School for Girls vs Hyman Frank	McG & S
52234 W S F	Felix P. J. Agnew vs Thomas Constantino	C J O C
51186 F J R	Mariannina Annetta vs Ernestina Marcanetti	W H McS

45164 F & H	Harry Baker vs Frank Dixon	W & G
52508 G W B Jr	Joseph Tomoski vs Nellie Hamilton	L F N
52561 C & C	Walter H. Jackson Co. vs A. George Gardiner	H E & M
47588 G H R	New Acme Plating Co. vs Kescot Mfg. Co. Inc.	L B & McC
52693 Ballou	Joseph Sczerbinski vs Monte Robinson	H & S
52694 Ballou	Vitol Sczerbinski p. a. vs Monte Robinson	H & S
41862 E & A	William Handley vs John F. O'Gorman	
52324 F & H	George N. Dunbar vs Norman Harris	P & S
52325 F & H	Mary Dunbar vs Norman Harris	P & S
53021 J V	Carmala Folcarella vs Carmela Bruno	N H
52567 B C	Giuseppe Badego vs Ferdinando Torrenso	H & S
52957 C & Cooney	Mary J. Geurin vs Herbert C. Talbott Exr.	

FRIDAY, JUNE 16, 1922

46425 S & S	Themistock A. Fraoni vs Giuseppe Poji	C & C
MP455 C M B & L	Jas. E. Battey et al. vs City of Providence	E S C—H
48985 W S F	Walter J. McIsaac vs R. I. Shell Fish Co.	R T B
51410 R & H	Edith V. Carr vs George L. Bowen	L & McC
51409 R & H	John Carr vs George L. Bowen	L & McC
50158 F & H	Andre Leyneck vs Alice Hunt	S J C
52752 McG & S	Joseph A. Wolf Tr. vs William H. Draper	J H
50829	Fannie L. Walsh vs William C. Greene	S K & S
49632 L B & McC	Kescot Mfg. Co. vs Paul D. Jorjorian et als	G H R
50210 C & Cooney	Carmine D'Errico vs Emogene Ewold	C A W
48258 C & DeS	Narzarene Mani vs Frank Mani	F E S
53309 J E B	Annie L. Hunt vs Warren G. Brisswell	G H & A
53066 P & DeP	Albert Giusti vs Alfred Del Papa	J E B
53266 H & S	Wright-Ziegler Co. vs Ervido Natali	P & DeP
45221 F & H	Harold Hitchcock vs William H. Cooney	C & C
53308 J E B	Andrew L. Hunt Adm. vs Globe Coal Co.	C & C
53309 J E B	Andrew L. Hunt Adm. vs Warren G. Buswell	P & S
49147 McG & S	William E. Bowen vs Michael Hattub et al.	M A S
49933 H E & M	J. E. Ahrena vs Ogus, Rabinovich & Ogus	P C J—M

District Court Appeals Calendar

MONDAY, JUNE 12, 1922

50600 Com & C	Nora F. McCarthy vs Charlotta N. Golina, Ap.	L B & McC
51407 S-F	Walter Simpson vs Louis A. Servant	W J H
52087 W & W	Joseph Dionne vs Josephine McGuirk, Ap.	G Helford
52062 J-J	The Newton Tea & Spice Co. vs Narr. W. G. Co.	Alexander
44637 S-M-B	Harrison W. Mills vs Celestina Mori, Ap.	P & DeP
49453 T M O'R	John R. Lemos vs F. L. Eddy Trucking Co.	J O-J
51288 R G E H	Nathan Sallinger vs Erganine Gentile, Ap.	J V
49566 W C H B	Natl. W. G. Co. vs N. Cipola, Ap.	W M P B
52058 H E & M	Perry & Whipple vs Samuel Bomes	J O W
52586 R & R	Harry Tanger vs Union Paper Co. et al., Ap.	C S S
52587 R & R	R. I. Tobacco Co., Inc. vs Dean Pharmacy	P & DeP
52622 T M O'R	Thomas H. Early, Ap. vs Turner Center System	J S M
51975 W R P	W. R. Prescott vs Anthony Stephens, Ap.	S S B
51277 McG & S	Caroline Slater vs Katherine Abbott, alias Ap.	F & F
53060 G E & C	Joe Levy, Ap. vs Reliance Delivery	W A G
52986 C R E	Serafina DePalma vs Pietro Acciaciola	C & O'C
52625 J P H	William F. Stone vs William Shannon, Ap.	Q & McK
53058 C R B	Leon W. Knight vs Charles A. Bennett, Ap.	W A G
49726 P & DeP	Nicola Leone vs Vincenzo Fazzino, Ap.	J V
53373 Pettine	M. C. Brown vs August Perry	Dooley

53065 S-F
49832 McG & S-V
50380 C C & M-C

Walter Simpson vs Stanley Chinkiwck, Ap.
Marshall B. Martin vs Albert M. Hussey, Ap.
Odier Trottier vs Isidor DiNeo, Ap.

Peter Quinn
R & R
C & O'C

TUESDAY, JUNE 13, 1922

50358 W M P B
52149 J T W
51928 B & B
51321 R & R
50594 S-M-B
51734 N H
49684 S & S
52487 A & A J
52496 R G E H
52352 S I J
51109 M-B E C S
52762 R T B
52767 S-M-B
53622 T M O'R
52841 S J C
52698 L S
52909 L S
52303 S
52225 B & C
52226 B & C
52661 J E B
51574 J A T
53114 C S S
53183 McK & B
53348 Slocum
45344 R & R
53117 J V
51662 C S S
49256 C S S

Israyel Kosroffan vs Hampartyoom Sahagian
James J. Whalen vs Burton K. Harris, Ap.
Mario Tirocchi vs Harmon Rubin, Ap.
Harry Lavent vs Prov. Ice Cream Co., Ap.
U. S. Cabinet Bed Co., Ap. vs Union Furn. Co.
Samuel Frank vs J. Alvio, Ap.
John Forlini, Ap. vs John Rambone et al.
Benjamin H. Cooper vs Hamilton Mills, Ap.
Nathan Sallinger vs Guiseppe Delelli, Ap.
Charles J. Ehrlick vs J. A. Wall, Ap.
Children's Veh. Corp., Ap. vs Centre C. D. G. Co.
Weybosset P. F. Mkt., Ap. vs Frank A. Wall et al.
Scheinert Goldman Co., Ap. vs Paul Dev'ne
Thomas H. Early, Ap. vs Turner Centre System
Albert A. Watson vs Dominic DiSantro
J. Fried, Ap. vs Arlance Leville
Charles Lazor vs L. B. Richardson
Belcher & Loomis Hdw. Co. vs P. A. Decker Co.
A. Baer & Son vs Barney Potter, Ap.
Union Leather Co. vs Barney Potter, Ap.
Walter L. Kelley vs Miles S. Jensen et al.
J. Edward Kerney vs David Morris, Ap.
Lanson O'l Co. vs Lord's Garage, Ap.
Gioacchina A. Carella vs Luigi Petrucci et al., Ap.
Standard H. & G. Co. vs Douglas Ave. C. & W. Co.
R. I. Supply Co., Inc., Ap. vs Herman P. Goldberg
Rocco Catalozzi vs Joseph Ryan, Ap.
H. C. Anderson et als. vs David Orleck, Ap.
Smith & Holden Co. vs N. Eugene Elec. Co., Ap.

J Rustigian
C R E
L S
J M C
F & L
C R E
Brothers
N H
B C
McG & S
S H B
McG & S
G H
J S M
J C S
F J D
E H Z
J F C
J T W
J T W
L F N
McK & B
S N
J V
C & O'C
P C J-B & B
C H McC
J Smith
P & DeP

WEDNESDAY, JUNE 14, 1922

47907 W & W
50186 McK & B
52103 J-J
48973 P & DeP
52217 S I J
49733 J B L
52584 A L C
50841 R & R
52061 H E & M
52375 H M
52633 T M O'R
51969 W R P
51568 T F V
52219 J H C
49554 G H & A
50624 P & DeP
53131 C S S
53175 C S S
53169 W S J
53298 Alexander
49089 P & DeP

O. Johnson & Co. vs Francesco Angregrano, Ap.
Leonard P. Bosworth vs Bernard W. Campbell, Ap.
American W. & M. Co. vs S. Backman & Son, Ap.
Carmine Caranci, Ap. vs Fred Parker
J. L. Trottier vs Leon Rosenfeld, Ap.
Avezyn's & Dvaredsas vs Garabed G. Melidossian
Atlantic Refining Co. vs F. A. Decker Co.
Nathan Gordon vs Vincenzo E. Amico
George Sulley vs Samuel Bomes, Ap.
Charles F. McNally vs James H. Tower I. W., Ap.
Edward E. Rider vs William Biloham et ux., Ap.
Dominica Scotti vs Daniel Rosarte, Ap.
Patrick F. Finnerty vs Benjamin J. Dyer, Ap.
Edward Alarie vs Elizabeth T. Garvey, Ap.
Invincible Tire Co. vs Stewart Gould, Ap.
Nicola Quartucci vs Peter Hicks.
Met. W. G. Co., Inc., Ap. vs Arthur Delavalla
Harry Lyon & Co. vs Arthur Delavalla, Ap.
J. Frucht, Ap. vs I. Hapanovich
V. E. Babington vs William C. Butler
The New England Grocery Co. vs B Mansuette

I & McK
D E G
J S
J L C
F L O
G A B
J F C
B C
C A W
R T B
C M B & L
S S B
R J McM
Cooney & C
H W K
C A W
P & DeP
P & DeP
J L J
P M
C R E

THURSDAY, JUNE 15, 1922

50115 Salisbury-F
52172 A & A J
50279 R & R
44981 Stiness-M
49981 C M B & L
49233 B A H
49234 B A H
47290 W M P B

Walter Simpson vs Martin Cooke, Ap.
Ginsburg Bros. vs Louis Taber
Louis Rothstein, Ap. vs Harold Hersh et al.
The Allen M. School, Ap. vs Maude M. Crawford
Narr Fin. Co., Ap. vs Mfg. Lia. Ins. Co.
Angelique Garse vs Peter F. Hughes, Ap.
Albert Garse vs Peter F. Hughes, Ap.
Harry Taylor vs Frank Storti, Ap.

S K & S
Brand
Deft.
R P McM
F A J
W & W
W & W
L V J

52660 J O	James Nevillo vs John Desomice, alias Ap.	J B L
52702 R & R	Joseph Comras, Ap. vs Harry W. Shepardson	H P E
52769 Stiness	New York Bargain House, Ap. vs Paul Levine	G H
45054 C & O'C	Fortunato M. Thimas vs S. N. Slaimen, Ap.	C & B
52843 Hicks	Nathan Sallinger vs Austin Albanese	F H W
51669 Slocum	L'ning Bat. Ser. Co. vs T. J. Hayes, Ap.	P E D
52920 G H & A	John Cullen et al., Ap. vs Leo R. Donahue et als.	T P C
51652 R G E H	Nathan Sallinger vs Edgar A. Charboune, Ap.	P E D
49086 P & DeP	Antonio Zelano, Ap. vs David Shore	W A H
51340 D A C	Frank Roberts vs Weaver & Wood, Ap.	R T B
53056 T M O'R	Imperial C. Co. vs A. B. Cascombas, alias Ap.	W W
53342 Slocum	Barstow Stove Co. vs C. H. Starr et al.	Bannon
51569 E H Z	Sanderson Bros. vs William A. Tyron Co.	J W G
51794 C S S	H. C. Anderson et al., Ap. vs Thomas W. Ferguson	G & C
53043 P & DeP	Nicholas Lombardi vs Mark Clougherty, Ap.	F & F

FRIDAY, JUNE 16, 1922

51735 S I J	Morris Feinberg, Ap. vs Joseph Gearin	C & Cooney
49565 N H	Samuel Faher vs Guiseppe Catullo	L V J
47491 F & M	Julian Plociak vs Peter Rublenski, Ap.	P E D
47238 J S N	Joseph S. Neves vs Joaquin D. Felipe et al., Ap.	T L C
51049 F J R	Eorico Cipriano, p. a. vs Raffaele Feoli, Ap.	J B Lawlor
47741 L B & McC	Albert Wine vs John Meunier, alias Ap.	P & DeP
52627 A S J	Fred O. Gardiner vs George Banoffe, Ap.	A A
52832 J G LeC	William H. Logan, Ap. vs James Earle	J B E
52833 C & C	The Atlantic Refining Co. vs Joseph Grace, alias	W A H
52991 R & R	Keystone State Oil Co. vs Silverman W. M. Co., Ap.	C W L
49555 P & DeP	Enrico Almonti vs Bert Sterns, Ap.	F H W-O
53055 C Q A	Michael J. Kilroy vs Robert McLaughlin, Ap.	J P B
46896 P & DeP	Morris L. Sackin, Ap. vs Henry Roch	McS
52912 E A	Archibald Delaney vs Louis A. Broady, Ap.	S S B
49785 W J B	Jonathan Watterson, Ap. vs Joseph A. Bonin et ux.	F & H
52353 M W	David Bida vs Benjamin Weisbaub	G H
52039 J E B	Charles Kayatta, Ap. vs Irving K. White et al.	L F N
53237 Alexander	Hyman Frank vs Abram Myers	L S
48047 G H & A	Invincible Tire Co. vs E. L. Smith, Ap.	W W O
49841 C S S	Met. W. Groc. Co. vs Leon Brtuner	PVM-R&R
53180 J H C	Hyman Scher, Ap. vs Huntington Littlefield	C W L

SUPREME COURT

Frederick A. Stevens

vs.

The Superior Court

} M.P.No.375

OPINION

(Before Capotosto, J., Below)

SWEETLAND, C. J. This is a petition for writ of prohibition which shall restrain the Superior Court from taking further action in a petition for divorce except to enter a discontinuance of same.

It appears that on February 13, 1922, Frederick A. Stevens filed his petition for divorce from Claire F. Stevens, which petition is now pending in the Superior

Court. On March 27, 1922, upon the application of said Claire F. Stevens, Mr. Justice Capotosto in his rescript made an allowance out of the estate of this petitioner for the support of said Claire F. Stevens and the three minor children of petitioner and respondent pendente lite, and also an allowance out of his estate for counsel fees to enable her to defend against said petition for divorce. On March 28, 1922, this petitioner filed in the office of the clerk of the Superior Court a notice of discontinuance of his petition for divorce and served copies of said notice of discontinuance upon the attorneys of record of said Claire F. Stevens. On April 1, 1922, that being the first motion day in the Superior

Court after the filing of the notice of discontinuance, said notice came before Mr. Justice Capotosto and the matter of the discontinuance of said petition for divorce was partly heard, and was continued to April 8th, 1922, for further hearing. Thereupon the petitioner commenced the proceeding now before us.

At the hearing in this court, counsel for the petitioner cited in support of his petition for the writ of prohibition a number of cases from other jurisdictions which he regarded as authorities for the doctrine that a complainant in equity is entitled as a matter of course to discontinue his suit at any time before the entry of an interlocutory or final decree therein. These opinions however are not pertinent here as the right of the moving party at law or in equity to discontinue his action or suit is regulated by statute, Section 27, Chapter 283, General Laws, 1909, is as follows: "Sec. 27. The plaintiff in any civil action, suit, or proceeding at law or in equity, in which process has been returned to any court, may at any time before the trial or hearing thereof be begun file in the office of the clerk of such court, a written notice of discontinuance signed by himself or his attorney, and stating therein the action, suit, or proceeding to be discontinued and the time of filing such notice, and if the action, suit, or proceeding shall have been answered, a copy of such notice shall be given immediately to the defendant or his attorney of record by the plaintiff; and thereupon said court, on its next motion day, or the next civil session of the district court, shall enter such discontinuance, as, of course, and as of the day of filing such discontinuance, unless it shall appear that the rights of some other party thereto, or interested therein, will be impaired by such discontinuance; and no costs accruing after such discontinuance by the

court shall be taxable for the defendant."

By virtue of this section, on the next motion day in the Superior Court after the petitioner had filed his notice of discontinuance, there was presented to said justice the judicial question as to whether the rights of the petitioner's wife would be impaired by such discontinuance. This question has been heard in part by said justice and is now pending before him.

The petitioner claims that the Superior Court was without jurisdiction to act otherwise than to enter said discontinuance, because it is contrary to public policy for that court to force a petitioner for divorce to proceed against his will, upon his petition to a decision and final decree which may divorce him from the bond of marriage. We have no reason to assume that the Superior Court is about to take the action which this claim of the petitioner suggests. From what has been made to appear here said justice has under consideration and has continued for further hearing the question of whether the petitioner's wife has rights under her application for an allowance, and the determination of said justice made thereon, which will be impaired by the entry of a discontinuance, and if she has rights the further question as to the conditions which, in justice to the parties, should be imposed upon the entry of discontinuance.

The petitioner further claims that the Superior Court is without jurisdiction for the reason that at the time the petitioner filed said notice of discontinuance that court had not entered a formal decree in favor of the petitioner's wife for the allowance which said justice made in his rescript. In this position the petitioner would have us take too narrow a view of the effect of the respondent's application under the statute for an allowance out of the estate of her husband. When one spouse brings the other into court

upon a petition for divorce certain rights arise to the respondent. By Sections 13 and 14, Chapter 289, General Laws, 1909, the respondent may by motion avail himself of any matter which would be open to him upon a cross-petition and upon such motion the court may grant affirmative relief to the respondent. This court has held that if a respondent proceeds to avail himself of the benefit of this statutory provision the petitioner will not be permitted to deprive the respondent of such benefits by discontinuance of the petition. *Borda vs. Borda*, 43 R. I. 384. This benefit is secured to a respondent not by force of a decree entered in the cause, but because of the statutory provision in his favor. If the respondent in divorce be a wife, the statute prescribes that in the discretion of the court an allowance may be made in her favor out of the estate of her husband for the purpose of enabling her to defend against the husband's petition for divorce, provided she has no property of her own available for that purpose; and under the statutory provision giving to the court, which has original jurisdiction in divorce, the power to make such interlocutory decrees as may be necessary (Chapter 247, Section 16, General Laws, 1909), the practice has become established of entertaining the application of a wife, whether a petitioner or a respondent, for an allowance from the estate of her husband for her support pendente lite. *Sanford vs. Sanford*, 2 R. I. 64. When a wife, who is a respondent, files an application for either of such allowances, the right accrues to her under the statute to have a determination upon her application, and the husband will not be permitted to defeat that right by a discontinuance, just as he can not defeat her right to have a determination upon a motion filed by her in the nature of a cross-petition. If a decree for an allowance has been entered, then upon the filing of a notice of discontinuance

such interlocutory decree should be modified if justice requires its modification to meet the changed conditions and the court should take such action as would prevent an impairment of the wife's right under the original or the modified decree. If, as in this case, a notice of discontinuance is filed after the wife's application for an allowance has been heard and determined in her favor, but before a decree has been entered, then the court should enter a decree as of the date of its determination for such amount as it shall deem proper in the circumstances; and the petition should not be discontinued until the rights of the wife are protected. If a wife has made application for an allowance in accordance with the statute, then a right has accrued to her, although upon such application there has been neither hearing, determination nor decree, which right should be safeguarded upon discontinuance.

In our opinion said justice was acting within his jurisdiction in considering what modifications should be made in his allowance to the wife for counsel fees and expenses if the cause was not to proceed to a final hearing, and also how her rights under the allowances for support and counsel fees should be secured to her in case of a discontinuance. A similar view has been taken by the court in *O'Neil vs. O'Neil*, 100 Iowa, 743, *Waters vs. Waters*, 49 Mo. 385, *Woodward vs. Woodward*, 84 Mo. App. 328.

It appears to be the claim of the petitioner that if there is a discontinuance there should be no allowance for counsel fees. It has been held by some courts that an allowance to the wife for the purpose of enabling her to prosecute or defend against a petition for divorce looks entirely to the future and will not be granted for the purpose of paying the claims of counsel for services already performed. There appears to us, however, to be much force in the contrary

opinion, and even when the court has held that generally there should be no allowance for the purpose of paying for services already rendered, an exception has been made in favor of services in connection with the filing and prosecution of a wife's petition for an allowance, *Anderson vs. Steger*, 173 Ill. 112.

There is a further fundamental reason, arising out of our established practice in this form of proceeding, which would require us to dismiss the petition. This court will not by the extraordinary and discretionary writ of prohibition restrain said justice from the determination of a matter within his general jurisdiction because the petitioner fears that the action of the justice may be adverse to the petitioner or may be erroneous. In *Haworth vs. Sherman*, 37 R. I. 249, this court said: "Generally when an inferior tribunal has jurisdiction of the subject-matter of a proceeding, this court will not upon an application for a writ of prohibition consider disputed questions, the determination of which has been committed by law to such inferior tribunal." Even where the jurisdiction of the inferior tribunal is questionable or plainly lacking we will assume that such tribunal will pass correctly upon the question of its own jurisdiction. This court will not prohibit the action of such tribunal but will leave the parties to their ordinary methods of review following a decision, unless it appears upon the fact of the record that such inferior tribunal is without jurisdiction and it further appears that if such tribunal should assume jurisdiction a decision therein might work irreparable injury. This court has granted the writ in a number of cases restraining action upon application to take the poor debtor's oath, where the magistrate was clearly without jurisdiction, and a discharge of the debtor would result in an injury to

the committing creditor which could not be corrected upon review.

Petition denied. The restraining order heretofore entered is vacated.

For Petitioner: Waterman & Greenlaw.

For Superior Court: Flynn & Mahoney and Fitzgerald & Higgins.

SUPREME COURT

City of Providence for
the Benefit of
Adelard Malo

vs.

Samuel Goldberg

Ex.&c.No.5621

City of Providence for
the Benefit of
Thomas Maguire, p. a.

vs.

Samuel Goldberg

Ex.&c.No.5622

OPINION

(Before Sumner, J., Below)

RATHBUN, J. These two cases are actions of debt on bond, brought in the name of the City of Providence, for the benefit respectively of said Malo and Maguire. The instrument upon which each of these actions is brought is termed "Motor Bus License Bond" and contains all the formal requisites of a bond with the exception that no seal is attached to said instrument.

It appears that one Jacob Goldberg desired to obtain from the Board of Police Commissioners of said city a license to operate a motor bus within said city for the purpose of transporting passengers for hire; that the instrument in question was executed by said Jacob Goldberg as principal and by the defendant as surety and that by the terms of said instrument both principal and surety are bound to said city in the penal

sum of \$2000. The obligation clause in said instrument recites that said Board of Police Commissioners has pursuant to the provisions of the Public Laws of the State and the ordinances of said city granted to said principal a motor bus license and that said principal and surety have jointly and severally agreed to pay all damages sustained by any person and caused by any negligent or unlawful act on the part of said principal or his agents in the conduct of the principal's business as a motor bus operator. Said clause further provides that nothing contained in said instrument shall be construed as imposing any liability inconsistent with the law relative to contributory negligence.

The declaration in each case alleges that said Jacob Goldberg as principal and the defendant, Samuel Goldberg as surety by their written obligation sealed with their seals jointly and severally promised to pay to said city the "sum of \$2000 upon the terms and conditions set forth in said bond." The declaration in each case alleges as a breach of the condition of said "bond" that the motor bus of said principal, while employed in the business for which said license was granted, was negligently driven against the person for whose benefit the suit was brought to the injury of said person while he was in the exercise of due care.

The cases were tried together before a justice of the Superior Court sitting with a jury. The jury apparently found in each case that the negligence of said principal was the proximate cause of the injury and that the person for whose benefit the first suit was brought was damaged to the extent of \$125, and that the person for whose benefit the second suit was brought was damaged to the extent of \$600. The verdict in the first case was as follows: "The jury find that the defendant did promise and does

owe in manner and form as the plaintiff has in his declaration thereof complained against him and assess damages for the plaintiff in the penal sum of \$2000 and jury chancery said bond in the sum of \$215. The verdict in the second case was the same with the exception that the final figures were \$600 instead of \$125.

The transcript contains the following memorandum: ("Court received verdict of the jury on chancery of the bond, and at the same time directed a verdict for the penal sum of the bond. Defendant's counsel thereupon objects and refuses to give his consent to such a verdict being received. Defendant's exception overruled and exception noted.")

Each case is before us on the defendant's said exception and also on his exception to the refusal of the trial court to direct a verdict for the defendant.

Did the trial court err in permitting the jury, which rendered the verdict for the penal sum, to chancery the bond, or in other words to determine the amount for which an execution should issue? Sections 3 and 4 of Chapter 294, G. L., 1909, provide as follows: "Sec. 3. In all actions brought for the breach of the condition of a bond, or to recover a penalty for the non-performance of any covenant, contract, or agreement, when it shall appear, by verdict, default, submission, or otherwise, that the condition is broken or the penalty forfeited, judgment shall be entered in the common form for the penal sum, but execution shall issue thereon as is provided in the following three sections." "Sec. 4. The court shall award an execution in such case for so much of the penal sum as shall then be due and payable in equity and good conscience, for the breach of the condition, or other non-performance of the contract; which sum shall be ascertained and determined by

the court, unless either party, before the day fixed for hearing therein, shall move to have it assessed by a jury, or unless the court shall think it proper to have the question so decided, in which case the sum so due shall be assessed by a jury." We think it was the intention of the legislature, as expressed by sections of the statute above quoted, that judgment shall be entered for the penal sum before the court shall proceed, either with or without a jury, to determine for what sum execution shall be awarded. The jury were permitted, against the defendant's objection, to determine the amount for which an execution should be awarded, although judgment for the penal sum had not been entered. Judgment could not have been entered without consent until after the expiration of seven days after rendition of a verdict for the penal sum, as the defendant was entitled to have said verdict remain open for a period of seven days in order that he may have an opportunity to commence proceedings to attack the verdict.

In *Bowen vs White*, 26 R. I., page 71, this court said: "The jury should have found affirmatively or negatively upon the issues, which, like all issues in the action of covenant, were special. Then, after judgment for the penal sum of the bond, the court or another jury should have assessed the damages, according to equity and good conscience." See also *Blaisdell vs. Harvey*, 25 R. I. 572; *Tilley vs. Cottrell*, 21 R. I. page 310.

It was argued that there would be a saving of time and effort by having the amount for which an execution should be awarded determined at the time of the decision or verdict for the penal sum. It is sufficient answer to say that the legislature has prescribed a different procedure. The defendant's exception to the action of the court in permitting the

jury, which found that there had been a breach of the instrument termed a bond, to also determine at the same time the amount for which an execution should be awarded is sustained.

It was stated at the hearing that a practice prevailed in the Superior Court of submitting to the same jury, by agreement of parties, the question of liability on the bond and the question as to the amount for which an execution should be awarded. Parties, of course, may, with the consent of court, agree that, in the event of a verdict for the penal sum, judgment may be entered forthwith for the penal sum and also agree that the jury may proceed to fix the amount for which an execution should be awarded. If judgment is entered for the penal sum it would seem that the defendant would be precluded from thereafter questioning to correctness of the verdict for the penal sum; but if the parties with the consent of court agree to waive their rights to have reviewed the findings of the jury on the question of liability on the bond we think they may properly do so and have both questions at the same time submitted to the jury.

Should the parties in an action of this nature desire to submit both questions at the same time to the same jury and reserve their respective rights to attack the verdict which may be rendered on the question of liability, we think they are entitled to agree, with the consent of court, to allow the jury which passes upon the question of liability on the bond to also pass upon the question as to the amount for which an execution should issue in the event of final judgment for the plaintiff for the penal sum of the bond.

The defendant's other exception is to the refusal of the court to direct a verdict for the defendant. The defendant contends that inasmuch as the instrument (in the form of a bond) upon which

liability was based did not bear a seal, said instrument was not a bond and that the actions should have been brought in assumpsit instead of in debt on bond.

Nine Corpus Juris, at page 14, states the rule as follows: "As a general rule, in the absence of statute providing otherwise, a seal is of the essence of a bond, and no writing can have the qualities which attach to a bond without the seal of the party executing it, and in the absence of a seal an instrument will not be construed as a sealed bond, although there is a recital in the body thereof that the obligors and parties have set their hands and seals thereto."

There has been considerable legislation throughout the United States tending to partially or totally abolish the use of seals. In this State the legislature has dispensed with the use of seals in a number of instruments which at common law were required to be sealed. Neither a general or a special release nor an instrument discharging a mortgage, in whole or in part, is required to be sealed. G. L. 1909, Chapter 293, Sec. 12. An instrument purporting to convey real estate is a deed although unsealed. The word "covenant" in a deed or instrument to which no seal is affixed thereto. Sec. 4 of said chapter. Section 14, Chap. 32, G. L. 1909, provides as follows: "Section 14. Whenever a seal is required to be affixed to any paper, the word 'seal' shall be construed to include an impression of such seal made with or without the use of wax or wafer on the paper." This language clearly shows that the legislature did not intend to dispense with the use of seals on all instruments. In *Providence Telegram Co. vs. Grahman Engraving Co.*, 24 R. I., at 177, Stiness, C. J., said: "As to bonds, there has been no change in the law, and seals seem still to be required."

As the instrument upon which these

suits were based is not a bond and as the suits were actions of debt on bond we think that the trial justice should have granted the defendant's motion to direct a verdict in his favor and that the failure to do so was error.

At the time of argument the plaintiff filed a motion that this court permit the declaration to be amended by adding a count in assumpsit. In view of the conclusions which we have already reached we think that the motion must be denied. The motion is denied without prejudice as to any rights which the plaintiff may have to commence any action other than debt.

The plaintiff, if it shall see fit, may appear before this court on the next motion day, at 10 o'clock a. m., and show cause, if any it has, why an order should not be entered remitting such case to the Superior Court with direction to enter judgment for the defendant.

For Plaintiff: George F. Troy.

For Defendant: Charles R. Easton.

SUPREME COURT

Emma H. Kimball

vs.

Mass. Accident Co.

} Ex. & C. No. 5542

OPINION

(Before Barrows, J., Below)

SWEENEY, J. This is an action of assumpsit to recover the amount due upon an accident insurance policy issued by the defendant to Harry W. Kimball, July 16, 1914. The plaintiff is the beneficiary named in said policy and seeks to recover from the defendant on the ground that the death of Dr. Kimball was caused solely by accidental means within the terms of said policy. The action was tried by a justice of the Su-

perior Court, jury trial having been waived, and decision was given for the defendant. The plaintiff has duly brought the case to this court upon her bill of exceptions and now claims that said decision was contrary to the law and the evidence and the weight thereof.

The policy insured Harry W. Kimball, by profession a physician and surgeon, against "loss or disability as herein defined, resulting directly, independently and exclusively of any and all other causes from bodily injury effected solely through accidental means." It contained many provisions and limitations, one of which was that "the insurance hereunder shall not cover any injury, fatal or non-fatal, sustained by the insured while participating in, or in consequence of having participated in aeronautics, from ptomaines, or from disease."

The evidence proved that Dr. Kimball was a practicing physician specializing in dermatology; that he died March 28, 1920; and that the cause of his death was erysipelas.

The trial justice found that the deceased called Dr. Gifford, March 20, 1920, and complained of a boil on the back of his neck about where his collar button would come. He told the doctor that the boil had started about a week before and that he had been dressing and taking care of it himself. Dr. Gifford had treated the deceased for several abscesses prior to this time and recognized this one as being different from the others and concluded that erysipelas had developed. Dr. Richardson agreed with this diagnosis and both of these experts testified that erysipelas is an infectious disease, and that for a person to develop it he must pick up the particular kind of an organism that causes the disease by direct contact.

Against the objection of the defendant, Dr. Gifford was permitted to testify that

the deceased told him that he had seen three erysipelas cases within a week before he called Dr. Gifford. The trial justice found that the plaintiff's proof did not show that the erysipelas was effected by accidental means, and that the open boil became infected with the erysipelas germ in some unknown way.

The plaintiff claims that Dr. Kimball received the infection from contact with an erysipelas germ while engaged in the treatment of patients suffering from erysipelas and that this infection was bodily injury effected solely through accidental means." To support this claim, plaintiff cites the case of Hood & Sons vs. Maryland Casualty Co., 206 Mass. 223. In this case the policy sued upon was entitled, "Manufacturers Employers Liability Policy." The contract which it contained was one of indemnity in which the defendant engaged to make good to the plaintiff any loss or damage which it might sustain by reason of its liability to its employees for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. The insurance was liability insurance, so-called, and not insurance against accidents.

The liability insured against was that "imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered * * * by any employee." Plaintiff's employee, on duty as a hostler in its stables, contracted glanders and brought an action against the plaintiff for negligently putting him to work in the stable and thereby exposing him to the disease. Judgment was rendered in his favor and then plaintiff brought the present action to recover the amount paid from the insurance company. The question before the court was whether the injury to the employee was brought about accidentally, within the scope and meaning of the policy, or whether it

was the result of disease contracted while in the employ of the plaintiff but for which the defendant was not liable. The court held that the infection which caused the disease from which the employee suffered was due to accident, saying: 'It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease.' The court held the defendant liable to pay the damages which the plaintiff had paid to its employee.

The later case of *Smith vs. Travelers Insurance Company*, 219, Mass. 147, is more in point and is against the claim of the plaintiff. The court held that the plaintiff could not recover in an action brought on a policy of accident insurance wherein the deceased was insured against death resulting from "bodily injuries, effected directly and independently of all other causes, through external, violent and accidental means." It appeared that the deceased was using a nasal douche as he had been in the habit of doing; that he "snuffed" or drew breath into his nostril more violently than he usually did and consequently there passed through his nostril, and thence by way of Eustachian tube through a hole in the mastoid bone in the middle ear into his brain, *staphylococcus* germs which caused his death from spinal meningitis. The court said, "There was nothing accidental in the inhalation of this douche. The deceased did exactly what he intended to do. This particular act of inhalation, though harder or more violent than usual, was not so far as appears, harder or more violent than he intended it to be. There was no shock or surprise during the inhalation which made him draw a deeper breath than he intended to draw, nothing strange or unusual about the circumstances. The external act was ex-

actly what he designed it to be, though it produced some internal consequences which he had not foreseen. Accordingly there was no bodily injury effected through a means which was both external and accidental. But it is only for a death resulting from injury effected through such means that the defendant is made responsible by the policy. It is not sufficient that the death or the illness that caused the death may have been an accidental result of the external cause, but that the cause itself must have been not only external and violent, but also accidental.

"We cannot find that there was 'any external, violent and accidental means' producing the injury which caused the death other than this inhalation by the deceased of the nasal douche, which he took, not accidentally in any sense of that word, but purposely, with full knowledge of its character, and in the very way in which he intended to take it."

The defendant contends that the deceased died as the result of disease and that erysipelas causing his death was not "bodily injury effected solely through accidental means."

A case in point sustaining the defendant's contention is that of *Bell vs. State Life Insurance Co. (Georgia)*, 101 S. E. Rep. 541. This was a suit on a policy of life insurance for the recovery of the disputed double indemnity due for the death of the assured if it could be shown that his death resulted "from bodily injury sustained and effected directly through external, violent and accidental means exclusively and independently of all other causes." The petition stated that the insured was a physician by profession and that he attended professionally a child suffering from the disease known as erysipelas. It also stated that the insured wore glasses and that in adjusting his glasses while

attending said patient, he accidentally caused a scratch or abrasion of the skin on or near his right ear, which scratch or abrasion of the skin became infected with the germs of the disease of erysipelas resulting in his death.

The court found that the evidence showed that the abrasion upon the ear occurred at the office of the deceased and that he continued to treat and come in immediate contact with the patient affected with erysipelas, living about two miles away, for several days thereafter; and that there was no direct or specific evidence tending to show that the fatal infection might have been contracted from germs, collected upon the glasses, which entered the wound or scratch upon the ear at the time that the abrasion occurred.

The court held that if one who has knowingly sustained an accidental abrasion upon the exposed surface of his body thereafter continues to bring himself in contact with and treat a patient affected with a virulent type of contagious disease, such as is capable of being transmitted through immediate proximity with such exposed wound or abrasion, and as a result of such voluntary risk he thus becomes infected with and contracts the disease and it results in his death, the proximate cause thereof cannot properly be said to be original "bodily injury" sustained and effected directly through violent, external and accidental means exclusively and independently of all other causes; and affirmed judgment for the defendant.

Another case upon the nonliability of the defendant is that of the Maryland Casualty Co. vs. Spitz, 246 Fed. 817, L. R. A. 1918 C, wherein the Circuit Court of Appeals held that death from erysipelas was not "accidental" within the meaning of a policy insuring against death by "accidental means" when it was caused by germs entering a boil when scratched by the unclean hands of

the deceased. The court said the deceased seems to have done just what he intended to do, namely, to rub or scratch his neck to relieve the itching and in our opinion breaking the scab during the process was a probable result, one reasonably to be expected. The court quoted from U. S. Mutual Accident Association vs. Barry, 131 U. S. 100, as follows: "If a result is such as follows from ordinary means voluntarily employed in a not unusual or unexpected way, it cannot be called a result effected by accidental means."

In determining that an injury occurred by "accidental means" it should appear that the cause or means governed the result and not the result the cause; and that, however unexpected the result might be, no recovery could be allowed under such a provision unless there was something unexpected in the cause or means which produced the result. New Amsterdam Casualty Co. vs. Johnson, L. R. A. 1916 B, note p. 1021.

In the case of Lehman vs Great Western Acc. Asso., 155 Iowa, 737, 42, L. R. A. (N. S.) 562, the court said, in construing the phrase injury by "accidental means": "It is not sufficient that there be an accidental, that is, unusual and unanticipated, result. The 'means' must be accidental; that is, involuntary and unintended."

The policy in this case provides that recovery for the death can be had only when the insured dies from bodily injuries effected solely through accidental means resulting directly, independently and exclusively of any and all other causes. When a man is injured while doing merely what he intends to do, he is not injured by an accident, unless the course of his action has been interrupted or deflected by some unforeseen or unintended happening.

The "bodily injury" the deceased had was an open boil or abscess and the primary question is, was this caused by "ac-

cidental means"? According to his statement to Dr. Gifford, he had been treating and dressing it for a week and there is no testimony to show that its open condition or infection was the result of "accidental means." The trial justice has correctly found that there is no testimony to show that the open boil was infected with the erysipelas germ by "accidental means." The infection of the boil by the erysipelas germ was not of the kind that naturally develops from the boil itself. Erysipelas was an independent and intervening cause of death. The testimony shows that the death of the insured was the result of disease and not of bodily injury effected solely through accidental means.

There is no error in the decision of the trial justice. The plaintiff's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the decision.

For Plaintiff: W. J. Brown and A. Matteson.

For Defendant: E. C. Stiness, D. H. Morrissey and C. J. Brennan.

SUPREME COURT

Emma Kimball	}	Equity No. 531
vs.		
Mass. Accident Co.		

OPINION

(Before Tanner, P. J., Below)

SWEENEY, J. This is an appeal from a decree of the Superior Court denying complainant's motion to vacate a final decree theretofore entered by said court.

The bill of complaint averred that the complainant is the widow of Harry W. Kimball and the beneficiary under a policy of accident insurance issued by the

respondent, July 14, 1914, which provided, among other things, that in case of the death of Mr. Kimball, effected solely through accidental means, it would pay the beneficiary the sum of \$7500; that said Harry W. Kimball died March 28, 1920, solely as a result of accidental means; that the complainant demanded payment of the amount of said insurance; that the respondent denied liability and refused payment, whereupon the complainant brought an action at law upon said policy in said Superior Court, and that said action was then pending in said court.

The bill also averred that after bringing said action at law the complainant discovered that at the time of the issuance of said policy, July 14, 1914, said Harry W. Kimball was carrying an accident policy issued by said company, September 29, 1910, which was then in full force and effect, in which she was named as beneficiary and which was more liberal in its terms and provisions for Mr. Kimball and her than said policy issued July 14, 1914.

The bill also averred that said Harry W. Kimball was induced by the respondent to consent to the substitution of the policy, dated July 14, 1914, in lieu of the one dated September 29, 1910, by means of the fraud of the agents of said respondent, in that said agents fraudulently represented to said Kimball and induced him to believe that the substituted policy covered the same risks as the original policy and was in effect a renewal thereof except for an increased premium on account of the amount payable at the death being materially increased. Whereas, in fact, under the terms of the original policy the insured was given a broader and more ample protection than under the substituted policy and an additional limitation upon the liability of the respondent was contained in the substituted policy to the effect that "the insurance hereunder

shall not cover any injury, fatal or non-fatal, sustained by the insured while participating in or in consequence of having participated in aeronautics, from ptomaines or from disease," and that this limitation would be a defense in said action at law upon said new policy.

The bill prayed that the substitution of the new policy in place of the original policy be declared to be fraud upon the rights of said Harry W. Kimball and of the complainant as beneficiary, and that the original policy be ordered to be reinstated and declared to be the policy in force at the time of the death of said Harry W. Kimball in place of said new policy, and for other relief.

The respondent filed an answer, denying that it or its agents had been guilty of any fraud or improper conduct which constituted a fraud upon the rights of said Harry W. Kimball or of the complainant as beneficiary under said policy.

After hearing upon bill, answer and proofs by the Presiding Justice of the Superior Court, a final decree was entered, dismissing the bill. Several findings of fact were incorporated in the decree, one of which was that said Harry W. Kimball was not induced to consent to the substitution of the new policy for the original one by fraud or false representations or improper conduct upon the part of the respondent or of its agents.

The final decree dismissing the bill of complaint was entered April 22, 1921, and no appeal was taken therefrom, within six months thereafter, namely, Sept. 13,

1921, the complainant filed her motion that said final decree be vacated, that she be granted leave to file an amended or supplemental bill in said cause, and that such further proceedings might be had as justice and equity might require. After a hearing upon this motion a decree was entered, Nov. 10, 1921, denying the same and the complainant duly filed her claim of appeal therefrom. The reasons stated for the appeal are that said decree is contrary to the law and the evidence and should be reversed and that the court erred in its application of the law to the facts set out in the affidavit in support of said motion to vacate said final decree.

The complainant advisedly claimed no appeal from the final decree dismissing her bill of complaint as her solicitor states in his brief that he decided to await the result of the trial of the action at law and then, in case of an adverse decision, to move to vacate said final decree or file a bill of review.

A person aggrieved by a final decree in equity must claim an appeal therefrom within thirty days from the entry thereof. Section 25, Chapter 289, General Laws, 1909. In discussing the right of appeal in an equity cause, this court said in *McAuslan vs. McAuslan*, 34 R. I. 462, on page 473, "If a party aggrieved by a decree may appeal, we think the weight of authority and regularity of procedure would require that he must appeal or lose his right to have the objectionable decree revived by this court."

The present appeal brings before the court for review only such matters as are involved in the decree appealed from and cannot bring before the court any alleged error contained in the final decree itself or any matters arising in the

cause previous to the entry of the final decree. *McAuslan vs. McAuslan*, supra, p. 474.

The motion to vacate said final decree is filed under authority of Section 2, Chapter 294, General Laws, 1909, which provides, among other things, that in case of decrees in all equity causes the court entering the same shall have control over the same for the period of six months after the entry thereof, and may, for cause shown, set aside the same, and reinstate the cause or make new entry and take other proceedings with proper notice to parties, with or without terms, as it may direct by general rule or special order.

The only additional facts contained in the affidavit filed in support of the motion to vacate the final decree which were not introduced in evidence during the trial of the equity cause, prior to the decision and entry of the final decree, are to the effect that Dr. Kimball while suffering from a boil or abscess on his neck treated three erysipelas cases; that within a short period an infection of erysipelas developed in said boil or abscess, which resulted in his death; that the defendant in said action at law claimed that erysipelas was the cause of Dr. Kimball's death; that erysipelas is a "disease;" and that the defendant was not liable under the provision in its policy which provided that it would not be liable for death "from disease."

It appears from the record that said action at law upon said substituted policy was tried before a justice of the Superior Court, June 6, 1921, jury trial having been waived, and resulted in a decision, July 12, 1921, for the defendant upon the grounds that the death of the insured, had not been effected solely through accidental means and that it was not liable for death caused by "disease."

The bill of complaint was brought to

set aside the substitution of the new policy for the original one on the ground that the substitution had been procured by the fraud of the agents of the respondent. The court found against the complainant on this issue and dismissed the bill.

In the affidavit filed with the motion to vacate the final decree no newly discovered evidence of fraud in procuring the substitution of the new policy for the original one is stated, nor are any other facts stated in the affidavit supporting said motion which would justify the court in setting aside said final decree.

The complainant's appeal is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to that court for further proceedings.

For Petitioner: William J. Brown and Archibald Matteson.

For Respondent: E. C. Stiness, Daniel H. Morrissey and Christopher J. Brennan.

SUPREME COURT

Mal'kon Semon'an
vs.

James Panoraz

} Ex. & c. No. 5586

RESCRIPT

After the opinion of this court was filed April 3, 1922, the defendant, by leave of court, filed a motion for re-argument. This motion has been considered and, as it does not contain any matter which was not fully considered and passed upon by the court before delivering its opinion, the motion for re-argument is denied and dismissed.

For Plaintiff: Cooney & Cooney.

For Defendant: Hugo A. Clason.

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SUPERIOR COURT

Adelina Corria et al.

vs.

Fink Brothers

} W.C.A.No.341

RESCRIPT

TANNER, P. J. This is a petition under the Workmen's Compensation Act in which the mother and minor brother and sister of the deceased workman are seeking to recover compensation because they were partly dependent upon the deceased.

The only question raised in hearing the case was as to their dependency.

It appears that the widow of the deceased employee has already recovered from the third party causing the death \$3000. Under the provisions of the act, therefore, she appears to have elected to receive her compensation from the third party.

We find from the testimony that she was living with her husband at his death and is, therefore, conclusively presumed to have been wholly dependent upon him. If she was wholly dependent upon him, she was, as we understand the statute, entitled to all the compensation due, and if she has waived the compensation due by electing to take damages from the third party causing the death, it seems to us that no person who was only partly dependent has any claim for compensation under the act.

On the testimony we find that the mother of the deceased was not at all dependent upon him at his death and that his brother and sister could be only partly dependent, although there is much

doubt as to whether they were at all dependent, since the testimony of his wife is that he had only \$15 a week and gave it all to her.

The petitioners have cited the case of Cahill vs. Terry & Tench Co., 173 N. Y. A. D. 418, but in that case there was an independent liability to the mother notwithstanding the liability to the wife, and the court very properly said that the election of the wife was not for the benefit of the mother and had no effect upon her claim. But, as already stated, we understand our statute to give a person partly dependent no claim where there is a person wholly dependent. If there is a person wholly dependent who is entitled to all the compensation, it seems to us that under our statute that person extinguishes the liability of the employer wholly by taking adequate damages from the third party causing the injury.

The petition is therefore denied and dismissed.

For Petitioner: Samuel I. Jacobs.

For Respondent: Henshaw & Sweeney.

SUPERIOR COURT

William Loiselle et al.

vs.

Pawtucket Ice Co.

} W.C.A.No.351

RESCRIPT

TANNER, P. J. This is a petition brought under the Workmen's Compensation Act in behalf of two minor children of the deceased petitioner, Wilfred Loiselle, and also in behalf of Minnie Loiselle, a second wife of said Wilfred Loiselle, whose divorce petition against said Wilfred had been granted, although final decree had not been entered at the death of said Wilfred Loiselle.

We find that the said Wilfred Loiselle came to his death through an accident arising out of and during the course of his employment by the defendant company, he having been killed by an automobile driven by a third party during the course of his employment.

We further find that said petitioner, Minnie Loiselle, second wife of said Wilfred Loiselle, was living separate and apart from said Wilfred Loiselle at the time of his death for justifiable cause and was therefore, under the act, wholly dependent upon said Wilfred Loiselle.

We also find that the said minors, William Loiselle and Wilfred Loiselle, Jr., were at the time of the death of their father wholly dependent upon him.

The second wife, Minnie Loiselle, consents that decision may be entered, giving her one-third of the compensation and giving said minor children two-thirds of the compensation.

We think that compensation is due from defendant company at the rate of \$10 a week for the statutory period.

For Petitioners: Joseph T. Witherow.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 36

JUNE 9, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.

Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JUNE 12, 1922

Eq5837 G H & A	T. Howard Ray, for a new Trustee	
Eq5254 McG & S	Robert B. Deware vs Ind. Chem. Company	
Eq5874 Steere	I. B. Hawkins vs Ida J. Brown	
46979 L S	K. Bazar vs William J. McCarthy	C A F
Eq5877 McKenna	H. C. Gardiner vs K. M. Guile	
Eq5265 C C & McC	A. M. L. Molter vs S. A. Singer & Co., et al.	F H B
Eq5562 Troy	John Quinn et al. vs J. Drummond et al.	
47702 J S Curran	C. H. Davis vs M. L. Kiernan	West
Eq5880 Clarke	Centreville Savings Bank vs G. McGinn et al.	

TUESDAY, JUNE 13, 1922

Eq5479 Troy	A. Paolilli vs N. Piscatelli	McG & S
52449 W S F	W. J. Dion et al. vs Mae Maguire	C C & McC
Eq5085 T & C	A. Mascn et al. vs M. T. Cass et al.	
51043 F L O	J. W. Page vs B. F. Teft et al.	W H W
52704 Stiness	Columbia Doll & Toy Co. vs George Gerber	I Marcus
53358 S K & S	E. H. Bigelow vs W. Holdworth	G E & C
Eq5700 J L C	G. Rosenfeld vs Max Wunsch et al.	C & C

WEDNESDAY, JUNE 14, 1922

Eq5279 Troy	Owen Gomeroll vs V. Marzilli	F H W
Eq5872 McG & S	M. N. Grape vs William F. Terry et al.	
49985 Stiness	Bay State Wholesale Groc. vs L. Kuros	McK & B
Eq5876 H E & M	A. M. Briggs, Tr. vs R. I. Hospital et al.	
Eq5651 P & DeP	G. Scoppio et ux. vs V. Cannella	E M S
Eq5879 S K & S	J. A. Urquhart vs B. & S. Co-operative Asso.	

District Court Appeals Calendar

MONDAY, JUNE 19, 1922

48972 C R E	Christopher Albanese vs John Couti, Ap.	L V J
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TUESDAY, JUNE 20, 1922

53110 W R P	Nicholas Rossi vs Thomas Falciglio, Ap.	J C S
48690 C & O'C	Charles J. LaFluer vs A. Berman & Son, Ap.	C M B & L
49717 I S H	J. Samuels & Bro., Inc. vs Gennaro Onorato, Ap.	P & DeP

WEDNESDAY, JUNE 21, 1922

Commencement Day—Court Holiday

THURSDAY, JUNE 22, 1922

52921 T L C	Thomas J. Brennan vs Slefín & Rich, Ap.	G H
47061 I S H	J. Edwards Kerney vs Matthew Jackson, Ap.	T F F

FRIDAY, JUNE 23, 1922

52176 I S H	George Goodman vs Harry Miller, Ap.	N H
52491 W R C	Gertrude P. Witherill vs Edward A. Eaton	P Q

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Jury Trial Calendar

MONDAY, JUNE 19, 1922

49381 A & A J	Henri Bendel, Inc., vs Matie C. Messler	W & G
49011 J S Smith	Agnes Begnoche vs Noah Bogin	P & S
49012 J Smith	Napoleon Begnoche vs Noah Bogin	P & S
49013 J Smith	David Begnoche vs Noah Bogin	P & S
49014 J Smith	Napoleon Giroux vs Noah Bogin	P & S
50651 J Smith	Napoleon Giroux vs Noah Bogin	P & S
50652 J Smith	Yvonne Giroux vs Noah Bogin	P & S
49415 L B & McC	Isabel Peters vs Samillo G. Cambio	C & J
40688 W C H B	Jules Firlion vs George Fish	F E V O-W F
40678 W C H B	Fred Fillion, p. a. vs George Fish	F E V O-W F
49642 C C & McC	Clara Reynolds vs Sadie Gillen	F & H
51770 C & Clason	Antonoi Votta et al. vs Michael Zeoli	W A H
51813 B S & L	Ernest L. Smith vs Frank T. Manchester	S J C
52915 J L Curran	Harry Ainsworth vs John Lafazia	P & DeP
50174 Stiness-M	Ansonia Forest Products vs Lyon Harootunian	J R
52460 P C J-B	Eastern Beef Co. vs A. M. Harriett et al.	B & B
48647 D H M	Henry T. Wright vs Ambrose Desilets	McG & S
48648 D H M	Mrs. Henry T. Wright vs Ambrose Desilets	McG & S
48649 D H M	Mrs. Julia Riley vs Ambrose Desilets	McG & S
49202 McG & S	Ambrose Desilets vs Henry T. Wright	E C S-M
52210 A & A	Henry A. Jacobs vs Albert Laflamme	Cooney & C
52033 B W G	Frank Stead, Custodian, vs Ethel I. Warner	W & W
52317 S-M-B	B. F. Goodrich Rubber Co. vs F. A. Decker Co.	J F C

50792 Q & McK	Edward McCormack vs Charles Tynon	Chase-H
50791 Q & McK	Edward McCormack vs Thomas P. Dunn	Chase-H
53010 C S S	M. Fishman vs Hyman Mitchell	F H B
53139 Ziegler-K	Corinne Mart'neau et al. vs J. B. S. Brazeau	
53130 G C-McM	Julia A. Blodi vs Jerome F. Hennessey	H E & M
53152 Q & McK	Dana E. Bagley vs Maille Electric Co.	C S S
50406 P C J	E. E. Smith Co. vs Sanderson Mfg Co.	B S S & L
50616 Q & McK	Panfilo Rich vs Leon E. Danforth	W H McS
51259 P & DeP	Cosmopolitan Trust Co. vs John Tritalo	B C

TUESDAY, JUNE 20, 1922

51874 F & M	Theodore Goldstein vs Frederick Cooper	G E & C
51875 F & M	Soloman J. Broody vs C. Frederick Cooper	G E & C
52079 W M P B	Esther Perry vs Hugh McGuckian	J H C
48837 S-S	Philip Ruggieri, p. a. vs Alfred Bosquet	F & H
52547 R G E H	Joseph W. Monahan vs Armour & Company	H W H
52595 S-M	London Lightingware Corp. vs Pariseau Bros.	G H
48762 W T P-H	Samuel Farber vs W. E. Devine	McG & S
50326 C A W	Hugo H. DeWildt vs Stillwater Worsted Co.	M & T
36558 C & C	Mabel Smith, p. a. vs Oscar Swanson et al.	G H & A
50783 P & DeP	Joseph Panniccia vs M. W. Bosworth	L F N
51499 M & M	Benjamin H. Burdon vs Herman Unrath	W & G-L
52744 Z-K	William McGregor vs Lederer Realty Corp.	F A J
50149 G W B	Michael Malpa vs Ida Bezzan	C & O'C
50274 G W B	Crastece Spaziano vs Ida Bezzan	C & O'C
51646 C C & McK	Avedice H. Nahigian et al. vs John Rubin	P & DeP
51938 Q & K	John E. Pugh vs George F. Wheelwright	R & H
52276 L F N	Mary E. Jordan vs Lucy Stone, Ex.	J E B
53007 J G LeC	Cecelia Green vs John Corbin	E "
53018 F H B	Emma Martin vs Phoebe Almeda	Q & McK
53081 J V	Luigi Mainelli vs Costanzo Colamino	P & DeP
53162 T L C	Joseph Ak'ns et al. vs Patrick J. H. Mullcn	
47950 P & DeP	Annie Woodhead vs Annie Joost et al.	W S F

WEDNESDAY, JUNE 21, 1922

Commencement Day—Court Holiday

THURSDAY, JUNE 22, 1922

52138 Ziegler	Albert Magnelli vs Frank Cooper	B C
50773 W H H	San Shepard vs Charles T. Colvin	P & S
50771 W H H	San Shepard vs Charles T. Colvin	P & S
41946 B L & McK	Robert H. Collamore vs Francis Rusack et al.	E R W
41947 B L & McK	Annie E. J. Collamore vs Francis Rurack et al.	E R W
52481 R T B	Abbie L. Hubbard vs T. Raymond Scott	W & W
52482 R T B	George A. Hubbard vs T. Raymond Scott	W & W
52483 R T B	George A. Hubbard vs T. Raymond Scott	W & W
52526 J B L-McK	Patrick Hurley vs George Saxon	F & H
52195 S-M-B	U. S. Tire Co. vs Julius H. Preston, Jr.	G H & A
46671 S-M	Bankers Com. Sec. Co. vs Paige Mot. Co. of R. I.	W & G
50339 A B W	William W. Scott vs Chester R. Shelley	W M P B
52726 J L C	Elizabeth Hardman vs Peter Carderelli	F H W
52729 R & R	Bertha Silverman vs Reliable Fur Store	G J S
52885 H A R-W	Richard W. Jennings, G. T. vs Ind. Chem. Co.	McG & S
52936 W C H B	J. L. Anthony & Co. vs Harry Lerner et als.	
51789 W H McS	Michaels-Bauer, Inc. vs Max Kirsch	McC & S
49693 F & H	Ella K. Stubbs vs William J. Owler et al.	B & B
53004 J V	Guila Del Signeri vs Elv'ra Di Genza	B C
53127 J V	Mary E. Sutcliffe vs Edwin S. Godfrey	W & G
P.A. 820 Voight	Katherine L. Kerrin vs John F. Harlow, Ex.	
53157 C R E	Charles N. Fisher, Jr. vs J. J. C. Fiske	S K & S
51419 F H W	Gibreas Sahagian vs Peter Sahagian	J R
53157 Easton	Charles N. Fisher, Jr., vs J. J. C. Fisk	S K & S
53207 C S S	Republic D. & T. Corp vs Ambrose J. Kinion	E H McC
52206 C A K-Z	Lucy Gumblatt vs Mike Menzoian	C M B & L

FRIDAY, JUNE 23, 1922

40880 W H McS	Michael F. Sullivan vs John Monahan	W M P B
M.P.551 C M B & L	Anna B. Read et al. vs vs City of Providence	E S C-H
51820 S-S	Gennaro Turcone vs Cosmio Del Nigro et al.	C & B
47626 P W G-S	Valentine A. Fries vs Edwin E. Anthony	P V M
50658 J F M	Maybelle G. Nichols vs Industrial Tr. Co., Admr.	H E & M
51046 J F M	Maybelle G. Nichols vs Industrial Tr. Co., Admr.	H E & M
49213 J G LeC	Edward B. Jenkins vs Lloyd M. Sweet	H E E
51428 F & H	Henry McCabe vs Joseph Olney	W & W
51427 F & H	Henry F. McCabe vs Joseph Olney	W & W
48255 W C & C	Samuel Waldman vs E. F. Drew & Co., Inc.	G M & F
52367 G M & H	Max Lowenthal et al. vs Samuel Waldman	W C & C
50751 C A K	Margaret Brenann vs George C. Hervey	S & S
46227 C C & McC	Augustus S. Bartlett vs Benjamin Lodge	F & H
46844 E & A	Lizzie F. Olney vs Taxi M. Tran. Co. of R. I. et al.	L B & McC
51633 P R	Angelo Lucchetti vs Lenna Zettin	R T B
51634 P R	Pietro Signore vs Lenna Zettin	R T B
49993 G H & A	Henry Loveridge vs M. A. Gammino Const. Co.	P & DeP
51911 S-M-B	Briggs Engineering Co. vs Avice W. Borda	I' & A
53022 F H B	City of Pawtucket vs Charles Lautis et l.	P & DeP
53026 R & R	Abraham Ucran vs Irving H. Mixer	
53208 T & C	Commercial Finance Corp. vs Joseph Faunell	J R H
53023 F H B	City of Pawtucket vs Charles Santis et al.	P & DeP
53304 W S F-F	Eva Curley vs Manhattan Wholesale Groc. Co.	P & S
53305 W S F-F	Albert F. Curley vs Manhattan W'sale Groc. Co.	P & S
53306 W S F-F	Celia Smith vs Manhattan W'sale Groc. Co.	P & S

SUPREME COURT

Nicola Gizzarelli
vs.
Walter A. Presbrey et al. } M.P.No.376

OPINION

STEARNS, J. The proceeding is by petition for a writ of mandamus.

The petitioner is a foreign born subject of the King of Italy and a resident of the city of Providence. The respondents are the Police Commissioners of Providence. The petitioner, who had operated a passenger motor bus on the public highways in the city of Providence, after the enactment in January, 1921, of Chapter 93, of the ordinances of the city of Providence, made application to the respondent commissioners for a license to operate a motor bus. The application was denied for the reason that petitioner was not a citizen of the United States. Section 4 of Chapter 93 of the City Ordinances provides that no person shall operate a motor bus in any

street in the city without first obtaining an annual license therefor from the Police Commissioners, and that no such license shall hereafter be granted to any person who is under the age of 21 years, or not a resident of this State or who is unable to carry on an intelligible conversation in the English language or who is not a citizen of the United States. The claim is that Section 4 is invalid, in that it is a discrimination against citizens of Italy and a violation of the treaty between the United States and the Kingdom of Italy of 1871 as supplemented by the treaty of 1913. Article 3 of the treaty provides that, "The citizens of each of the high contracting parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights * * * and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

The question thus raised is to be de-

terminated by construction of the treaty, and this is now established by judicial decisions. In *Patstone vs. Pennsylvania*, 232 U. S. 138, it was held in construing this treaty, "that the equality of rights that the treaty assures is equality only in respect of protection and security for persons unnaturalized foreign born resident to kill wild game except in defence of person or property and to that end making it unlawful for such foreign born person to own or possess a shot gun or rifle, with a penalty of twenty-five dollars and a forfeiture of the gun or guns, was not unconstitutional under the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States nor was it in violation of the treaty with Italy; that a State may protect its wild game and preserve it for its own citizens; also, the fact that the act discriminates against a particular class, namely, aliens, does not invalidate the law. At p. 144, the general principle is stated that "a State may classify with reference to the evil to be prevented; and that if the class discriminated against is, or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. * * * The State may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses." In *Commonwealth vs. Hana*, 195 Mass. 262, it was held that a statute providing that licenses to hawkers and peddlers should be granted only to a citizen, or one who has declared his intention of becoming a citizen of the United States, did not violate the Fourteenth Amendment, and that such discrimination against aliens was a valid exercise of the police power.

Authority to use the public highways as a common carrier of passengers for hire is not a right belonging to the individual, but is in the nature of a privilege. *Child vs. Bemus*, 17 R. I. 230;

Morin vs. Nunan, 91 N. J. L. 506. The ordinances in question were enactments made in the exercise of the police power delegated to the City Council by the Legislature. *Fritz vs. Presbrey*, 44 R. I. Due consideration for the safety of the public requires that a careful selection should be made of the individuals to whom authority is given to use the public highways as carriers of passengers for hire. We think it fairly may be said that as aliens as a class are naturally less interested in the State, the safety of its citizens and the public welfare, than citizens of the State, to allow them to operate motor busses would on the whole tend to increase the danger to passengers and to the public using the highways. It is clear that we can not say that the evil to be apprehended and the proposed remedy are so dissociated as to warrant the court in holding the ordinance to be invalid. As there is a basis for the distinction made between citizens and aliens and for such a classification as made, the ordinance is not repugnant to the Fourteenth Amendment of the Constitution of the United States nor is it in violation of the treaty with Italy. *Crane vs. People of State of New York*, 239 U. S. 195; *Heim vs. McCall*, 239 U. S. 175; *Tragesser vs. Maryland*, 73 Md. 250. In no event can petitioner's rights be greater than those of citizens of other States of the Union. The power of the State in proper cases to make a distinction between its own citizens and citizens of other States has frequently been upheld. For instance, the State can prohibit citizens of other States in the Union from taking oysters in the navigable waters of the State. *State vs. Medbury*, 3 R. I. 138; from catching lobsters within the jurisdiction of the State. *State vs. Kofines*, 33 R. I. 211; can prohibit non-residents from catching fish for the manufacture of manure and oil and fish caught within the waters of the State, *Chambers Bros. vs. Church & Co.*,

14 R. I. 398. The right of the State to deny to aliens the right to practice law is undoubted. 1 R. C. L. 803. The test of such legislation is not whether there is a discrimination against aliens, but rather is there any proper basis for discrimination.

The ordinance does not interfere with the rights of aliens to engage in the ordinary kind of business and thereby to earn a living, or with any right of property, but denies to them certain privileges which the State in the exercise of its police power can grant or withhold in its discretion.

We find that the ordinance is valid.

The petition for writ of mandamus is denied and dismissed.

For Petitioner: Pettine & DePasquale.

For Respondents: Elmer Chace and Herbert Eklund.

SUPREME COURT

Arthur B. Harrington }
et al. } Equity No. 553
For an Opinion }

OPINION

SWEETLAND, C. J. The members of the Town Council of Warwick on one side and Jacob B. Gordon and Louis Gordon on the other have adversary interests in a question involving the construction of the statutory provisions relating to auctioneers. In this proceeding they have concurred in stating such question to the court and in requesting our opinion thereon in accordance with the provisions of Section 20 of Chapter 289, General Laws 1909.

It appears that on April 11, 1922, said Jacob B. Gordon and Louis Gordon resided in said Warwick but were not qualified electors of said town; that on said day they were by said Town Council ap-

pointed auctioneers of the town of Warwick to hold their respective offices until the next annual election of town officers in said town. A doubt has now arisen in the minds of the members of said Town Council as to whether under the constitution and laws of this State said Jacob B. and Louis Gordon were eligible to be appointed auctioneers as aforesaid, and as to whether the action of the Town Council in thus electing them was legal and effective.

The question submitted to us by the parties is as follows: "May the Town Council of any town appoint as an auctioneer to hold office until the next annual election of town officers, a person who is residing in and claims a residence in the town but who is not a qualified elector for said office?" The essential matter is as to whether the status of an auctioneer constitutes a civil office within the meaning of that term as it is used in Section 1, Article IX, of the constitution of Rhode Island. That section is as follows: "Section 1. No person shall be eligible to any civil office (except the office of school committee), unless he be a qualified elector for such office."

Counsel for Messrs. Gordon have urged that in the determination of the question before us we should look entirely to the nature of an auctioneer's functions; that the important consideration is that he is conducting a business for his own personal gain as an agent for private parties and not as an agent for the city or State. Counsel have called our attention to the status of auctioneers under the laws of other jurisdictions wherein it clearly appears that an auctioneer is not regarded as a public officer but merely as a person conducting a private business, for the prosecution of which a license is required, and counsel further urge that provisions of the Rhode Island statute which name auctioneers as public officers and

treat them as such are entitled to little weight in view of what counsel claim is the private nature of their functions.

With us, from early Colonial times down to the present sales at auction have been regarded as proper subjects for governmental regulation; and auctioneers with powers to make such sales in accordance with public regulation and having certain duties to perform with reference to the public revenue have been enumerated by the General Assembly among the town officers to be chosen by the electors on their town election days. Our present statutory provision is contained in Section 1, Chapter 49, General Laws, 1909, the essential portions of which are as follows: "The electors in each town shall annually, on their town election days, choose and elect as many town officers as by laws of the State are or shall be required; that is to say, a moderator to preside in all the meetings of the town, and a town clerk, a town council, to consist of not less than three nor more than seven members * * * one or more auctioneers * * * and all such other officers as by law are required in such town and as each or any town shall have occasion for." An auctioneer is required to take the engagement prescribed for civil officers generally; Section 15, Chapter 49, General Laws, 1909. It is provided in Section 2, Chapter 188, General Laws, 1909, as follows: "Every auctioneer shall, within ten days after his election or appointment, give bond to the town treasurer * * * conditioned faithfully to execute the duties of his office according to law." A penalty is prescribed

against all persons who "assume or exercise the office of an auctioneer," without being legally chosen, unless they are within certain excepted classes; Section 22, Chapter 188, General Laws, 1909. An auctioneer is required to retain from the amount of his sales a certain duty upon property sold by him and pay such duty to the general treasurer for the benefit of the State and the town in which he is elected or appointed; Sections 12 to 18, Chapter 188, General Laws, 1909, as follows: "In addition to the auctioneers elected in town meeting, the town council of any town may from time to time appoint as many more for their town as they may deem expedient, to hold their offices until the next annual election of town officers." An auctioneer appointed by the town council under the above section must be regarded as having the same status as an auctioneer elected in town meeting.

Counsel for the Messrs. Gordon might fairly argue that some of the statutory provisions to which we have referred above are perfectly consistent with the view that auctioneers are not civil officers and that such provisions may be regarded merely as regulations imposed upon the conduct of a private business. We think, however, that taking all the provisions together they unquestionably lead to the conclusion that the General Assembly has always intended to place auctioneers in the category of civil officers. This was the state of the law for more than a century before the adoption of our present constitution and has so remained for eighty years since. We must conclude that with us, by legislative intention, an auctioneer is the holder of a civil office within the meaning of that term as used in Section 1, Article IX, of the Constitution *supra*. We therefore answer the question submitted in the negative.

SUPREME COURT

J. Alfred Tougas
vs.
Jacques Lepoutres

} Ex. &c. No. 5614

RESCRIPT

(Before Blodgett, J., Below.)

This is a suit in assumpsit to recover seven months' rent which the plaintiff alleges is due from the defendant for the use and occupation of a furnished flat or tenement situated on Wells street in the city of Woonsocket.

It appears that the parties entered into a contract whereby the plaintiff agreed to let to the defendant for a period of one year, from July 1, 1920, the flat or tenement in question.

The defendant was in actual occupation of the premises for a period of four months. He had paid rent for three months. In May, 1921, the plaintiff returned to Woonsocket from Canada, where he had been in business and residing with his family, and brought this suit to recover the rent of the tenement for seven months at \$125 per month.

The case was tried in the Superior Court before a justice thereof sitting with a jury. Upon the conclusion of the testimony the jury were directed to return a verdict for the plaintiff for \$900.25, which included seven months' rent at \$125 and interest, \$25.25.

The case was tried in the Superior Court before exceptions of the defendant. The first exception is to the admission of certain testimony offered by the plaintiff; the second to the exclusion of certain testimony offered by the defendant, and the third to the ruling of the trial court directing a verdict for the plaintiff.

The defendant called as a witness an expert in real estate and inquired of him as to the worth of the tenement in question. This was objected to and ruled

out by the trial justice on the ground that it was immaterial, there being a contract of \$125 per month. We think that such ruling was correct and that a verdict for the plaintiff was properly directed. The remaining exception of the defendant as to the admission of the testimony offered by the plaintiff is without merit.

The exceptions of the defendant are all overruled and the case is remitted to the Superior Court for judgment for the plaintiff as directed.

For Plaintiff: R. L. Daignault.

For Defendant: G. Myette.

SUPREME COURT

James J. Dugan
vs.
Manuel Simas

} Equity No. 460

RESCRIPT

Before Tanner, P. J., Below.)

The cause is before us upon the respondent's motion for leave to reargue the case.

The first ground of the motion is based upon a mistake of fact, arising from the failure of the Clerk of the Superior Court to certify all the papers in the case to this court. Since the hearing before us said Clerk has transmitted to this court the claim of appeal filed by the petitioner on May 26, 1919, and also the rescript of the Justice of the Superior Court and they are now with the papers in the case.

The other grounds of the motion present no new matter, and were all within the consideration of this court before filing the rescript after hearing upon the appeal.

The motion for reargument is denied.

For Petitioner: Waterman & Greenlaw and M. A. Sullivan.

For Respondent: Knauer, Hurley & Fowler.

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SUPREME COURT

Manuel Simas
vs.
James J. Dugan

Ex.&c.No.5560

RESCRIPT

Before Blodgett, J., Below.)

In conformity with the notice contained in the rescript heretofore filed in this case the plaintiff has appeared to show cause. No cause having been shown to the contrary it is ordered that the case be remitted to the Superior Court with direction to dismiss the same with costs for the defendant.

For Plaintiff: Knauer, Hurley & Fowler.

For Defendant: Waterman & Greenlaw and M. A. Sullivan.

SUPREME COURT

Sarah J. Atkinson
vs.
Margaret Birmingham
et al.

Ex.&c.No.5557

RESCRIPT

(Before Brown, J., Below.)

The matter is before us upon the plaintiff's motion for reargument. All the points which the plaintiff makes in said motion were necessarily considered by a majority of the court before filing its former opinion, and were given all the weight to which they appeared to be entitled. The court has no intention of varying the rule, which is recognized in the opinion, that ordinarily malice is a question of fact for the determination of a jury. The court's decision is based upon the conclusion that with reference to the defendant, Costigan, there was no evidence upon which the jury could properly find, either ill will towards the plaintiff or a reckless and oppressive disregard of her rights.

In this motion counsel for plaintiff repeats the statement made by him in his argument before the court: that "plain-

tiff's counsel told him (Captain Costigan) the law and warned him against proceeding." We will not assume that counsel is wilfully attempting to mislead us as to the facts; but we find nothing in the record which justifies such statement.

Motion for reargument denied.

For Plaintiff: Charles R. Easton.

For Defendants: Elmer Chace and Oscar Heltzen.

SUPERIOR COURT

Florence B. Stranahan
vs.
Tilden-Thurber Corporation

No. 45247

RESCRIPT

SUMNER, J. Plaintiff brought suit to recover damages for the alleged injuries done to an emerald, set in a ring, which had been left with the defendant for the purpose of repairing the setting. There is also a count alleging the removal of said stone and the substitution of an inferior one. The jury returned a verdict for the plaintiff in the sum of \$4818.67 and defendant has petitioned for a new trial, urging inter alia that the verdict is against the weight of the evidence.

Plaintiff claims that she took the ring to the Tilden-Thurber Corporation, the defendant, to have the diamond setting repaired, and that when it was handed to her on the completion of the job, the emerald in the centre of the setting was so changed in appearance that she said it was not her stone and refused to accept it. Plaintiff, her husband, her brother-in-law, Mr. Perkins, several lady friends and a former housekeeper, testified and variously described the former color of the stone as "a dark, beautiful, clear green," "perfectly pure," "valvety," "a rich, deep, grass green," "and possessing no visible flaws." They say it is now "full of white flaws" "ETAQIN ETAQIN" "lighter in color," "crackly," "cloudy," "full of white flaws," and that the "culet

is rough."

It seems that none of these witnesses, except Mr. Perkins, ever examined the stone under a glass. Mr. Perkins testified that he was in the jewelry business in St. Albans and saw this stone a number of times; that he had noted two slight spots of carbon and one dark colored imperfection; that the flaws were not visible without a glass; that he last saw the stone six months or a year before this episode; that he had sold 25 emeralds in 34 years, but had never set one. He further said the stone is now cloudy and crackly and the culet is rough.

Mr. Perkins is the only witness for the plaintiff possessing any professional knowledge of stones who saw the emerald prior to its handling by the defendant.

The defendant presented the testimony of all the employees who handled the stone from the time it was received until its delivery back to the plaintiff; namely, Winship, clerk at the counter; Sawyer, the manager of the diamond department; Ouellette, the foreman of the shop, and Lees, the man who repaired the ring. Of these, Winship is the only one now regularly employed by the corporation. All four witnesses testified positively that they had noted its defects and that the defects in the stone today are the same defects that were in the stone before the ring was repaired. Lees, who repaired the points for the diamond, illustrated with his tools the exact manner of his work upon the ring; he stated that he first removed the emerald from the ring, then he resoldered the points for the diamonds and after that replaced the emerald, bending with his knife blade the points which kept it in place; that he polished the points with a jewelers' polishing lathe of cotton felt, washed the ring in a solution of warm water and ammonia and dried it in sawdust. He testified positively that the emerald had

not been exposed to heat at any time.

Messrs. Sawyer and Ouellette both testified that they saw the stone out of the setting; Ouellette that he took it from the bench, wiped it on a cloth and put it in the safe.

Plaintiff did not at the trial press the contention that an inferior stone had been substituted, but urged that the emerald had been seriously damaged in some way, and introduced testimony tending to show that an improper application of heat in the repairing of the diamond points may have produced the defects complained of. Howard L. Carpenter, a Providence expert, testified for the plaintiff as to experiments made by him upon three tiny emeralds. He heated one, as if in a setting, and cooled it quickly with water. The color apparently lightened and additional fissures and cracks appeared. He heated another on a charcoal block to a red heat (about the temperature for soldering), and allowed it to cool slowly. This made the stone a poorer emerald but did not hurt the color or transparency. He heated the third emerald set in a gold ring upon the charcoal block, melting two points of setting away from the stone. The value of the stone deteriorated and there were more flaws, but the stone did not change color. Mr. Carpenter says the emerald in suit is of excellent shape and of good color, but has a shivered appearance inside. He thinks the improper application of heat and cold might have produced the changes.

Howard D. Wilcox, a Providence expert, testified for the defendant as to experiments made by him in applying heat to a tiny emerald up to the fusing temperature, namely, red heat. He said it caused the emerald to become opaque and ruined the polish.

Mr. Wilcox thought the imperfections in this stone in question were not produced by artificial means but were natural. He further said that after the

stone had been cleaned and the accumulated soap, powder and dirt had been removed, it would become more transparent and less translucent; that the flaws would become more clear and the stone seem lighter in color.

Defendant took the depositions of some nine precious stone experts, mostly from New York and Boston, some of whom claimed to be the largest dealers in the country. They all agreed that the defects in the emerald were natural, not artificial.

R. S. Chapin, a witness called by the plaintiff, said the same thing. Most of these experts also said that in their opinion the color of the stone was its natural color. They all agreed that if the stone possessed the color and appearance described by the plaintiff's witnesses, it would be an unusual stone coming within the category of gems and worth from \$1500 to \$2500 a carat; that is, the stone, variously estimated as from two and one-half to three and one-half carats in weight, would be worth from \$3750 to \$8750.

After examinations made of this and the small emeralds offered in evidence, and a digesting of the testimony of the experts, the court is satisfied that a layman's opinion upon the quality and condition of emeralds is superficial and unreliable.

The testimony of the plaintiff, her husband and her friends, is undoubtedly sincere, but also is the testimony of non-experts and must be carefully weighed as such. It is difficult to believe that Messrs. Winship, Sawyer, Ouellette and Lees, all experts, each of whom made an excellent appearance as a witness, are all either absolutely mistaken or are perjuring themselves. They all testified positively that they had made a particular examination of the stone; that the flaws in the stone today are the same that there were when the ring was received by them to be repaired.

It is much more probable that the witnesses for the plaintiff, only one of whom had examined the stone with a glass and none of whom are emerald experts, are mistaken as to the actual color and condition of the stone before it was cleaned. It is true that Mr. House, defendant's clerk, testified that the stone looked more cloudily than it did a year or two before and looked as if it had more flaws in it than when he first saw it, but he says it has a good color now and never was the unusual stone that plaintiff claimed it to be, and that it had always had many flaws.

Mr. Stranahan says that, "We are very friendly with Mr. House," and the court feels that Mr. House made a special effort to be absolutely fair to both parties. For that reason considerable significance can be attached to his statement as to the original condition of the stone and its many flaws.

Messrs. Wilcox, Rothschild and other experts, point out that cleaning changes the appearance of an emerald, and Ouellette, who wiped the stone with a cloth while it was out of the setting, and Lees, who washed the ring in the solution, agreed that the stone was dirty and did look lighter after their cleaning. How thoroughly the stone had been cleaned on prior occasions, we do not know. It is not improbable that this was the most thorough cleaning it had been subjected to since set in the ring.

The court feels that it is much more probable that the changed appearance of the stone alleged by the plaintiff was due to the cleaning rather than to an improper act on the part of the defendant. Moreover, it seems unlikely that the original purchaser of the ring, Mr. Stranahan's father, a man reputed to be worth from \$50,000 to \$100,000, would have purchased at a St. Albans' store the stone described by the plaintiff's witnesses, viz.: a stone that the experts say would be an unusual stone and worth

from \$3750 to \$8750 at wholesale in 1917. The diamonds in the ring were only estimated to be worth about \$125, and the other jewelry possessed by Mr. Stranahan's mother at the time of her death, besides this ring, was estimated to be worth only a few hundred dollars.

Mr. Evison, one of the experts for the plaintiff, says the stone today is worth \$450 or \$500 at wholesale, and other experts estimate its value from \$100 to \$600.

The court feels that the plaintiff has not sustained her case by a clear preponderance of the evidence, and accordingly grants the petition of the defendant for a new trial.

For Plaintiff: Comstock & Canning.

For Defendant: Edwards & Angell.

SUPERIOR COURT

Giosue Tartaglia

vs.

Angelica Pezzullo et al.

} Eq. No. 5476

RESCRIPT

TANNER, P. J. This is a bill in equity brought to set aside an auction sale under foreclosure of a second mortgage. The plaintiff, who bought the premises for \$2650 at the sale, asks to have the sale set aside because he claimed that he bid under a mistaken idea that he was buying the place free of all encumbrances.

It clearly appears that the terms of sale were read and showed that the property was being sold under a second mortgage subject to a first mortgage. The terms of sale were read in English and the plaintiff, who is an Italian, claims that he does not understand English.

The case has been argued upon the mistaken supposition that the plaintiff did not know that there was any first mortgage. The stenographer's notes, however, show that the plaintiff testified that he understood the auctioneer to say there was one mortgage due and

another would be due in a week.

The plaintiff's brief admits that if the plaintiff knew there was a first mortgage his mistake would be a mistake of law in supposing that he was getting the whole property clear of mortgages.

According, therefore, to the admissions of the plaintiff's brief, his mistake was a mistake of law in supposing that when he was bidding on the foreclosure of an estate under a second mortgage where there was a first mortgage due, that the effect of his bid would be to give him the whole estate free of all encumbrances. For this reason alone, therefore, relief cannot be granted. Especially is this so since there is no fraud of any kind proven upon the part of the respondents.

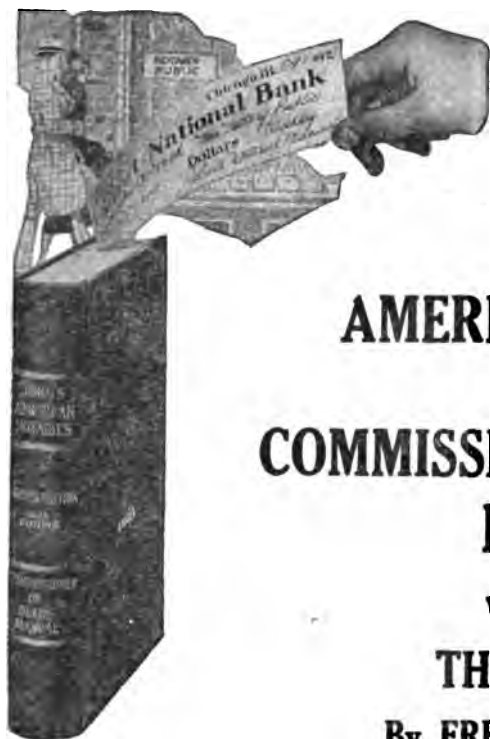
Most of the cases we have read on the subject also refuse relief where there is inexcusable negligence on the part of the plaintiff. The auctioneer in this case was an Italian, who spoke that language to the plaintiff. If the plaintiff did not understand the terms of sale read in English, he could easily have inquired of the auctioneer and could easily have ascertained that the place was being sold subject to the first mortgage. The negligence of the plaintiff seems to have amounted to gross negligence and to his failure to observe his positive legal duty to ascertain what he was buying.

The result of setting aside the sale would be to fasten the plaintiff's negligence upon the respondents. As we recollect the testimony, there was evidence of other bids nearly as high as that of plaintiff. These bids would be lost if the sale was set aside and it is by no means clear that they would be repeated.

We think the case is governed by the decisions of this court in Upham vs. Hammill, 11 R. I. 565, and Brunet vs. Yvette, 40 R. I. 546.

For Petitioner: George F. Troy.

For Respondent: James E. Dooley.



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No. 36

JUNE 16, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JUNE 19, 1922

Kent E C S	Grace L. Hammond vs Tide Water Oil Sales Corp.	S K & S
Pet.359 P E D	D. Oliva vs J. & P. Coats (R.I.) Inc.	
Eq5762 McG & S	M. Lawton vs John P. Smith	S W B Jr.
Eq5832 Bennett	J. F. Spinett vs Jason Spinett	
Eq5102 S & S	William Connole vs Luke Connole et al.	
Eq5015 G E & C	Alice B. Bowden vs William T. Ide	Beagan
Eq5092 J L C	Charles H. Davis vs M. L. Kiernan	A B W
Eq5652 C C & McC	L. F. Nork vs Annie E. Nork	W A S
Eq5888 J-H	H. Hazen vs B. F. Bucklin et al.	
Eq5889 J-H	B. Bronstein vs Harry Goldenberg et al.	
Eq5457 C C & McC	M. G. Medeiros vs M. D. Craveiro	
Eq5265 C C & McC	A. M. L. Molter et al. vs S. A. Singer et al.	Bellin
Kent Q & K	A. Cipolla vs. B. B. & R. Knight, Inc.	
Kent Q & K	J. B. Cusson et al vs R. Knight, Inc.	
Kent Q & K	V. Poncini vs. B. B. & R. Knight, Inc.	

TUESDAY, JUNE 20, 1922

Eq5865 J E B	R. B. Skinner vs Skinner Milling Company	
Eq5871 G H & A	William C. Angell et al. vs Rosie Fleisig et al.	
53482 C & Canning	Aldrich Bros. Co. vs Lortex Company	E & A
Eq5690 Cooney & C	John D'Arcy et al. vs D. D. T. Metivies	

WEDNESDAY, JUNE 21, 1922

(Commencement Day—No Assignments)

Jury Trial Calendar

MONDAY, JUNE 26, 1922

49176 T & C	Paul C. McAbee vs Nat'l Wholesale Grocery Co.	Cooney & C
50121 W H McS	Hazen Maxwell vs Alexander Weiner et al.	H E & M
50496 W C H B	Ward Elliott vs Annie M. Creamer	H E & M
52413 R & R	Elsie M. Coupe, p. a. vs Max Fradin	
52414 R & R	William Coupe vs Max Fradin	
52415 R & R	Elsie Coupe vs Max Fradin	
52555 P & S	Robert H. Erwin, p. a. vs Frank G. Rowley	H & S
52556 P & S	Elizabeth Erwin vs Frank G. Rowley	H & S
52557 P & S	Joseph A. Erwin vs Frank G. Rowley	H & S
48594 F & H	Lena C. Newman vs Robert G. Wilson	W S Jack
48593 F & H	John H. B. Newman vs Robert G. Wilson	W S Jack
49692 C & DeS	Gennaro Manfredo vs Joseph McCormick	C & Cooney
51885 S-M	Curtis & Co. Mfg. Co. vs Millers, Inc.	F H W
52856 C & O'C	Barned Kwasha vs Baer Ackerman	P C J
52192 C A W	James Moran vs Ernest Bolderson	C M B & L
52939 P & DeP	Francesco Arello vs Clemente Olivera	J F L
M.P.468 McG & S	William H. Watson et al. vs City of Providence.	Chace-E

52950 C & Canning	Christopher W. O'Brien vs Samuel H. Moskol	McG & S
52610 G F T	Edward J. Barr vs Ivan Desendarf	S S B
52596 T P C	John T. Cottrell Co. vs Samuel Needle	G H
52927 P C J	Miami Tile Company vs Max Wunsch et al.	R & R
53031 W S Jack	Giovano Nozoling vs Albert Oliviera	
5166 E F McE	Jonathan Andrews et al. vs Josephine Laperriere	
53147 B & B	Frederick Taylor vs A. L. Gifford et al.	S S B
51630 P & D	John Venditti vs Anna Robrick	A N P
M P.550 C & B	Charles A. Brayton et ux. vs City of Providence	Chase
51245 G M & H	Lizzie H. Davis vs United Railway Signal Co.	C & F
51251 P V M	Josephine Dziekiewicz vs Ernest Chow	W & W
53386 W W O	John Conlon vs Edward Lane	J H McG

TUESDAY, JUNE 27, 1922

42722 W & W	Edward W. Bradford vs John MacBeath & Son	G M & H
50100 R & R	Herman Rosner vs Harry Fisher	McG & S
49946 C N W	Thomas Walczak vs Antoni Kulig et al.	T F V
50133 T F V	Joseph Kulig et al. vs Thomas Walczak	C N W
52645 F H B	Albert Guisti vs Packard Motor Car Co., Boston.	C M B & L
52655 McG & S	Harry Fisher vs Herman Rosner	R & R
41500 M H & G	Ida M. Studley vs Dimond Co. et al.	G H & A
52788 F & H	Clement R. Butterworth vs Prov. D. B. & C. Co.	P & S
52797 S-M-B	Warner Sug. Ref. Co. vs Met. W'sale Groc. Co.	McG & S
45553 Brand & H	Angelina Monaco vs Augustino Ferrara	P & DeP
45554 Brand & H	Beneditto Monaco vs Augustino Ferrara	P & DeP
50975 C R B	Edga Eliason vs Arthur H. Kingsford	R T B
50376 C R B	John Eliason vs Arthur H. Kingsford	R T B
50977 C R B	John Eliason vs Arthur H. Kingsford	R T B
50978 C R B	Ruth Soderlund vs Arthur H. Kingsford	R T B
50979 C R B	Einar Soderlund vs. Arthur H. Kingsford	R T B
52320 C A W	Anna Von Gottschalk vs Lawrence Barone	P & DeP
53008 L & McD-L	Peter Davis vs Abraham H. Rohman	J S
53163 T L C	Hugh P. Ferrari et al. vs Morris Perlow	A G
51498 F & H	Alfred Messier vs John E. Pugh	Q & K
52930 C R E	Gloria Gaspoli vs Rocco Caruso	L V J
52455 M & T	Tyler Rubber Co. vs Romeo A. Bonin	C S S
52931 Cooney & C	Harris Ersenberg vs Henry S. Phillips	R M D
52719 J H C	Alexander Koslowsky vs August Demaire	R T O'N
53440 McK & B	Harry Lewis vs Mikold Hudyma	J F M

WEDNESDAY, JUNE 28, 1922

M P.484 J H	Charles B. Edwards et al. vs City of Providence	E S C
49675 E A	Willard N. Munro vs James W. Grosvenor	C & O'C
50203 C & C	Arthur Conaty, Rec. vs Louis Forghu et als.	R & R
52888 W H McS	Susie Leshuer vs John Tutalo	
37736 G E & C	John B. Nash vs Edward M. Fay	F & H
52815 J G LeC	Sebastiania Andrade vs John J. Cunningham	P & S
52816 Adnarde	Sebastiania Andrade vs John J. Cunningham	P & S
52794 McG & S	George Sarganis vs William Grad, alias	P C J
49612 B & B	David Korn vs Harold Congdon	W A G
49365 S-M-B	Eagle Cornice Co. vs Vincenzo J. Oddo	P & DeP
52075 E C S-M	Fed. Rubber Co. of Ill. vs Fred Morris Co., Inc.	F H W
50494 R & R	Joseph Scheck vs National Amuse. Realty Co.	B & W
50612 M & T	Corcoran Mfg. Co. vs Millers, Inc.	F H W
53477 C & C	Mary E. Kiernan vs United Electric Rys.	Whipple-W
53478 C & C	Thomas V. Kiernan vs United Electric Rys.	Whipple-W

THURSDAY, JUNE 29, 1922

52603 R & R	Joseph Pollock vs R. O. Millette	G E & C
49631 G H & A	William C. Angell et al. vs Gilberto Moni, al'as	P & D P
51523 A G C	Dr. Arthur Hollingworth vs William Rosberg	R & R
44693 P & DeP	Sadie A. M. Wunsch vs Patrick F. Dinagan, D. S.	A G
52193 W M P B	Antonio Mazzeo vs Ralph Pakusin	L S
49004 M & T	Met. Lumber Co. vs Robert A. MacDuff	T J McG
50752 C A K	Emily Reddington vs George C. Hervey	S & S
51034 J G LeC	Lud'bena D. Alves vs Mary Olivera	P R

51161 J A E	Manuel Sousa vs Sodini & Giusti	E R W
52470 W C H B	Calvin B. Miller vs William T. Hillis	W A G
52472 W C H B	Antone Pimental vs William T. Hill's	W A G
52473 W C H B	William T. Lomas vs William T. Hillis	W A G
50754 B & B	D. F. Silbert & Co. vs Giuseppe Peluso	J V
50959 P & DeP	Felicia Caranci vs Antonio Passarelli	J V
53035 C & Cooney	Sandilla Riga vs Ansell R. Morrell et al.	G E & C
53036 C & Cooney	Domenica Riga vs Ansell R. Morrell et al.	G E & C
53037 C & Cooney	Margaret Pofi vs Ansell R. Morrell et al.	G E & C
53419 F H B	Abraham Backer vs Riza Hussan	L & R

FRIDAY, JUNE 30, 1922

50965 J L C	William B. Parker, p. a. vs William V. Polleys	P T B
48566 P & DeP	Lena Ferrante vs Alessandrina Desautia	J V
48636 J V	Allessandrina DeSant's vs Francesco Ferrante	P & DeP
52952 P & DeP	Salvatore Tramonti vs Standard Fruit Co.	G E & C

District Court Appeals Calendar

MONDAY, JUNE 26, 1922

50839 C S S	William Strong, Ap. vs Abram Rosenberg	I H
50840 I S H	Abraham Rosenberg vs William Strong, Ap.	C S S
52168 E H Z	Thomas S. Pine vs Katherine Perkins, Ap.	Griffin
53552 G M & H	Workimgmen's Loan Ass'n vs Annie E. Marks, Ap.	E H McC

TUESDAY, JUNE 27, 1922

51335 I S H	Adolph Gold vs Mabel E. Orgelman, Ap.	G W B
53451 W & G	Joseph E. Fosky vs Walter S. Williamson	W C & G

WEDNESDAY, JUNE 28, 1922

52714 Horenstein	H. Saltzman vs M. Gallagher, alias	F & H
50436 J Ousley	Henry C. Caswell, Ap. vs Alfred Bernard	L & McD

THURSDAY, JUNE 29, 1922

44753 C R E	Emily Manton vs Walter L. Clarke, C. T.	H E E
53452 P C J	Hyman Yoffe et al. vs Myer Rich, Ap.	C H

FRIDAY, JUNE 30, 1922

53551 A & A J	Chic. Mint Gum Co. vs James Sarubi	J V
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SUPREME COURT

Evelyn Oken
vs.
Isidore J. Oken

} Ex.&c.No.5612

OPINION

(Before Tanner, P. J., Below)

SWEENEY, J. This is an action of trespass on the case for negligence wherein the plaintiff seeks to recover damages for personal injuries. The plaintiff alleges that the defendant so

negligently operated his automobile that it ran into her and caused her severe, permanent injuries. The defendant filed a plea in bar alleging that plaintiff is his wife and that he was living with her at the time of the accident and at the time of the filing of the plea. The plaintiff demurred to this plea and the demurrer was overruled by the Superior Court. The plaintiff thereupon claimed an exception to this action of the Superior Court and has duly brought the case to this court upon her bill of exceptions.

The sole question raised by the excep-

tion is: Can a wife maintain an action of trespass on the case for negligence against her husband to recover damages from him on account of injuries sustained by her by reason of his negligence when she was living with him at the time she was injured and at the time of the commencement of the action?

It is admitted by the plaintiff that under the common law the wife could not maintain such an action against her husband. Has such a right of action been given to her by the statute law of this State?

The property rights and liabilities of married women have been enlarged from time to time by the General Assembly of this State until, at the present time, the property of any woman, whether acquired before or after marriage or which may be acquired by her own industry, shall be and remain her sole and separate property free from any control of her husband. Section 1, Chapter 246, General Laws, 1909. Formerly it was required that in all actions relating to the property of any married women the husband and wife must jointly sue and be sued; Section 12, Chapter 166, Public Statutes, 1882. This section was amended in the revision of the General Laws, 1896, Chapter 194, Section 16, so as to read as at present, namely: "In all actions, suits and proceedings, whether at law or in equity, by or against a married woman she shall sue and be sued alone." In the case of Gorman vs. McHale, 24 R. I. 257, this court said the practical effect of the amendment was simply to do away with the former provision of the statute which required a married woman to join with her husband in actions relating to the property secured to her under the statute.

The attorneys for the plaintiff have cited several cases from other States in which the wife had been permitted to maintain an action against her husband for a violent assault upon her; but no

case been cited where the wife has maintained an action against her husband for personal injuries caused by his negligence.

The cases for the plaintiff have been decided in accordance with the statute law of the State in which the case arose, but the great weight of authority is against her contention.

The court has carefully considered the statute law of this State relating to the property rights of married women and finds therein no authority, express or implied, authorizing a married woman to sue her husband for damages for personal injuries caused by his negligence. If such a radical change is to be made in the common law rights and liabilities of married persons, as that urged by the plaintiff, it must be made by clear enactment of the General Assembly, and not by this court in giving an unwarranted construction to the meaning of the statute law relating to the property rights of married women.

The plaintiff's exception is overruled and the case is remitted to the Superior Court for further proceedings.

For Petitioner: Cooney & Cooney.

For Respondent: Greenough, Easton & Cross and E. G. Fletcher.

SUPREME COURT

Jennie F. Congdon

vs.

Louis H. Block

} Ex.&c.No.5579

OPINION

(Before Blodgett, J., Below)

SWEETLAND, C. J. This is an action of trespass on the case to recover damages for personal injuries which the plaintiff alleges she received, as a result of the negligence of the defendant.

The case was tried in the Superior

Court before Mr. Justice Blodgett sitting with a jury and resulted in a verdict for the plaintiff. The defendant duly filed a motion for new trial, which was granted by said justice. The cause is before us upon the plaintiff's exception to the decision of said justice granting the defendant's motion for new trial. The defendant has also brought a bill of exceptions to this court in which bill the defendant states his exception to the ruling of said justice, denying the defendant's motion to direct a verdict in his favor at the close of the evidence.

The injuries of which the plaintiff complained were received by her when she was struck and knocked down by the defendant's automobile, operated by him, on Elmwood avenue, in Providence. Said justice in his decision upon the defendant's motion for new trial reviews the testimony at length and concludes that the preponderance of the evidence is against the plaintiff's position that she was in the exercise of due care at the time of the accident. After an examination of all the evidence we are of the opinion that said justice was warranted in his conclusion and that the said plaintiff's exception should be overruled.

As to the defendant's exceptions, we must apply the rule laid down by this court in *Barstow vs. Turner*, 29 R. I. 100, as the same has been interpreted in *Malafronte vs. Milone*, 33 R. I. 460, i. e., that when a party has excepted to the denial of his motion for the direction of a verdict and after verdict against him the court has granted his motion for new trial, then, since he has obtained the new trial which he sought, this court will not hear him upon his exception to the refusal of the Superior Court to direct a verdict in his favor. This rule is directly applicable to the situation of the defendant. Although *Barstow vs. Turner* may be regarded as reasonably the subject of criticism in some respects,

which is logical and reasonable in some of its aspects, and the present members of the court do not feel justified in overruling it. We have said, however, in *Malafronte vs. Milone*, *supra*, that it is applicable only in cases which present similar circumstances. We will say in passing, that our examination of the evidence convinces us that in this case the defendant has not been prejudiced by the application of the rule.

The exception of the plaintiff is overruled and the case is remitted to the Superior Court for a new trial.

For Plaintiff: Waterman & Greenlaw.

For Defendant: Cooney & Cooney and P. C. Joslin.

SUPREME COURT

Nicola Laudati	} Ex.&c.No.5669
vs.	
Michele De Robbo & Son	

RESCRIPT

(Before Brown, J., Below)

This is an action of the case in assumpsit to recover for fifty cases of olive oil which the plaintiff alleges that he sold the defendant.

The case was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff for \$1555.30, being the amount of the plaintiff's claim. The defendants duly filed their motion for new trial, which was denied by said justice. The cause is before us upon the defendant's exception to the decision of said justice upon the motion for a new trial; the other exceptions of the defendants contained in their bill have not been pressed before us. We have examined them and find them to be without merit.

The defendants do not deny that they

received such merchandise or that they negotiated with the plaintiff for its purchase at the price which the plaintiff claims. Their sole defence is that at the time of the purchase the plaintiff was acting as agent of the Italian Importing Company of New York and that the defendants are indebted to said Importing Company for the oil and not to the plaintiff.

There was evidence from which the jury might find that at the time of said sale the plaintiff was the owner of the oil, that previously he had purchased the same from Importing Company and that he was selling it on his own account. It also quite clearly appears that at the time of the trial the Importing Company had no claim against the defendant for the oil but that the claim was charged against the plaintiff upon the books of account of said Importing Company.

We would not be warranted in disturbing the verdict of the jury which has been approved by the justice of the Superior Court who presided at the trial.

The defendant's exceptions are all overruled. The case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: Pettine & De Pasquale.

For Defendant: B. Cianciarulo and C. R. Haslam.

SUPREME COURT

Phenia J. Holmes

vs.

Vincent J. Oddo

} Ex.&c.No.5615

RESCRIPT

(Before Tanner, P. J., Below)

This is an action of trespass on the case for negligence.

The defendant is a physician and surgeon and the plaintiff alleges that he so negligently performed a surgical opera-

tion upon her that she is entitled to recover damages from him. The writ is dated August 10, 1921, and the defendant filed a plea of the general issue, August 13, 1921. February 10, 1922, the plaintiff made a motion to summon in and join as party defendant an insurance company which had issued a policy of insurance to the defendant, insuring him against liability for personal injuries occasioned by his negligence.

Section 9, Chapter 1268, of the Public Laws, passed at the January Session, 1915, provides, among other things, that the injured party in his suit against the insured may join the insurer as a defendant in which case judgment shall bind either or both the insured and the insurer; or said injured party after having obtained judgment against the insured alone may proceed on said judgment in a separate action against said insurer.

The motion was denied by the Presiding Justice of the Superior Court and the plaintiff claimed an exception thereto and has brought the case to this court upon her bill of exceptions in which she claims that the denial of said motion was prejudicial error.

Whatever may be said in favor of the merits of the exception, the action is prematurely brought to this court upon exceptions for the reasons stated in the case of Troy vs. Providence Journal Co., 43 R. I. 22.

The bill of exceptions is dismissed and the case is remitted to the Superior Court for further proceedings.

For Plaintiff: C. A. Kiernan and J. Semenov.

For Defendant: Lyman & McDonnell and Arthur Levy.

SUPERIOR COURT

Jenckes Spinning Co.	}	
vs.		
Thomas F. McMahon et al.	}	Eq. No. 5818

Crown Mfg. Co.	}	
vs.		
Same	}	Eq. No. 5821

Dexter Yarn Co.	}	
vs.		
Same	}	Eq. No. 5826

RESCRIPT

BARROWS, J. These three cases substantially were heard together, although the evidence was presented, so far as possible, in each one separately. Each case is heard on prayer for preliminary injunction against various individuals named as officers of the United Textile Workers of America, an unincorporated association, hereinafter called the union, together with all remaining members and associates of said union, and others unknown to complainant, acting in concert with the above described respondents.

Just before the strike, early in February, the Jenckes Company employed 3100, the Crown 784, and Dexter, 235 workers.

These bills, brought under General Laws of Rhode Island, 1909, page 300, Section 30, are substantially alike, and the cases were tried together to prevent a duplication of effort and evidence. Testimony in either case that bears on the others, by agreement is to be considered. The facts in each case involve the application of the same legal principles.

The bills allege, 1: That respondents

have conspired to cause employes to break existing contracts; and 2: That respondents have prevented and are preventing, by violence and intimidation, persons who are desirous of working for complainants, from doing so.

Testimony has been taken at great length and several hundred affidavits were admitted over respondents' objection. Motions to strike out portions of many affidavits were made by respondents. Of the matters which we have used in coming to our conclusion, none are to be found exclusively in the portions objected to. We admitted de bene the portions of the affidavits to which objections were made, but as we have not relied upon those, we do not feel called upon to rule specifically on the objections.

We find no evidence that any of the striking employes had existing contracts. Whether procuring them to quit under such circumstances is actionable, we do not decide on this hearing. Our consideration has been centred on the second charge and involves what is commonly known as picketing.

It may be well to note that the issue is not whether the strike is justifiable. The justification of the wage cuts and the merits of the 48-hour week are not before us. We are not mediating between contestants. Our only question is whether a certain weapon, to wit, picketing, used by respondents in the honest belief in their rights to use it, has produced a violation of complainants' rights. We shall not discuss respondent union's connection with the initiation of the strike, nor its responsibility for the

picketing. The former is not important in view of the union's admission that it is in charge of the picketing, the legality of which is the question now before the court.

The jurisdiction of equity to enjoin intimidating interference with those who wish to work for complainants is well established. Respondents' defence in substance is a denial of any improper interference with such prospective workers. They admit that a man has a right to work or to refuse to work and that interference with the free exercise of choice by violence or intimidation should be enjoined. They deny the use of violence and intimidation and assert that theirs was a "peaceful" picketing.

They admit full responsibility for mill-picketing by union and non-union strikers, and the evidence is abundant to show that they controlled and supervised it. They leave the evidence a little clouded as to their attitude on house picketing, but it seems clear to us that they tacitly ratified and approved it. Their counsel in arguing asserts the same right to picket houses as to picket mills.

The parties to the present case differ but little on the controlling legal principles. They part company on the application of the laws to the facts. Complainants contend that mass or group picketing necessarily constitutes intimidation; while respondents claim that such picketing may be so carried on as not to constitute intimidation. The law as stated by respondents' counsel in argument was said to be: "If this picketing was such as to have as its natural consequences the intimidation of the normal, ordinary

or average person, however you want to describe him, so as to bring that kind of a mind into a state of fear, then we must be held for the necessary consequences of what would follow naturally and inevitably from that kind of conduct." We have in this opinion applied to the facts such a statement of the law.

There has been much law on picketing during the last twenty years. The theory that intimidation to be objectionable must be a threat of bodily harm has never been accepted by good authorities.

See *Allen vs. Flood*, 1898, House of Lords, 46 Weekly Reports, 246.

Courts have recognized that some refined types of intimidation are far more effective than threatened physical violence.

Stephens vs. Ohio St. Tel. Co., 240 Fed. 749, at 774.

The last pronouncement of the United States Supreme Court holds that whether picketing is proper must turn on the facts of each case. Picketing involving communication for purposes of persuasion in some instances may be lawful, but a man desiring to work has a right to free passage along the streets unobstructed by non-workers.

This is not only the common law; it is the statutory law in Rhode Island.

General Laws, 1909, Chapter 344, Section 9..

He may be accosted socially or in an unoffensive way, says the Supreme Court, and an effort may be made, if he

is willing, to communicate and discuss information with the object of influencing him to quit. If the worker does not desire to talk over the situation, "persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free."

Amer. Steel Foundries vs. Tri-City Central Trade Council, U. S. Supreme Court, Advance Opinions, Jan. 1, 1922, at page 103.

The same case also holds that the number of pickets in the groups, which in that case was three or four groups of four to twelve in a group, constituted intimidation, and that it was idle to talk of peaceful communication with or persuasion of a worker while he is running the gauntlet of a striking group smarting under a belief that it has been unjustly treated and resenting the continuance at work of fellow laborers; that the meaning and purpose of such picketing are clearly understood by those who are parties to the controversy. Nor can an impartial observer fail to understand. The court will not on account of glib denials shut its mind to what the parties to the controversy know. If the law is to preserve the rights of all, it should not by accepting such evidence or by specious argument reach a result which everyone knows is contrary to human experience. This is why we cannot accept the argument of respondents that if a single man on the public highway in front of a mill may peacefully persuade a

worker to quit, the same thing may be done by several hundred, or any number short of such as creates a public nuisance.

Keuffel & Esser vs. International Association of Machinists et al., N. J., 1922, 116 Atl. 9.

Michaels vs. Hellman, 183 N. Y. Supp. 195 at 200.

It is interesting to observe that in the case of *New England Butt Company vs. William H. Johnston et al.*, Eq. 1355, in this court, our new Chief Justice Sweetland enunciated in 1907 his views of intimidation by picketing, and held the law to be that the gathering of pickets in such numbers as to overawe the workmen already at work, or when accompanied by the turmoil of a mob with jeers and opprobrious epithets and annoyances directed against workers should be enjoined.

Applying the above law, we pass to the consideration of the facts presented in these cases. We appreciate the force of respondents' argument that the affidavits are to be accepted with caution because they embody the notary's interpretation of the affiants' meaning. We have consequently leaned for our facts most heavily on the oral evidence, some of which has come from respondents and some from cross-examination of certain affiants.

The picketing in all these cases was in mass or group led by a captain selected or approved by Union Leader Thomas. During the early stages of the strike there were several hundred in front of the Jenckes plant. Always there

have been several hundred marching back and forth in front of the Crown plant, and sometimes a hundred at the Dexter.

Later, under the sheriffs' regime, the Jenckes group, consisting of 30 pickets every nine minutes marched around the plant; and at Dexter's 25 or 50 marched back and forth in two lines in front of the plant, so timing the march as to have the two lines meet in front of the entrance. Between some of the marchers in these lines workers at time had to pass to get into the plant. Strong pressure was put upon every striker to do picket duty. McMahon says the striker who asked benefits and could but did not picket was "put on the carpet" and given a "tongue lashing," which generally got results.

If we accept as wholly true respondents' evidence as to the nature of the picketing, there is little to show that attempts at communication with or persuasion of workers were made at the mills. Picket after picket recites that in accordance with instructions from the union perfect silence prevailed; that nothing was said to workers; that the talk was all among the picketers, "jolly-ing," and so forth. On such a showing, what was the purpose of gathering in large numbers? To "shame" them, one picket captain and President of a local union says: Every man who has reached years of maturity and watched such a witness as he answers, knows that "shame" translated into everyday language in cases like these means to scare them, to coerce them into not working, and to deprive them of the same free

choice which the strikers are fairly claiming for themselves. We can understand what the same witness had in mind from his later testimony that he had had too much experience to make a direct threat. Silent picketing by a large crowd may constitute quite as effective intimidation as noisy, abusive or violet picketing, especially with a crowd, as in these cases, was composed of the same pickets who elsewhere had indulged in improper conduct. The appearance of such a crowd in silence becomes most sinister. That many workers were in these cases so intimidated merely by the large number of pickets seems to us perfectly clear.

We find on the evidence, however, that the picketing was not silent. Vile names were constantly called by pickets; opprobrious epithets like "scab," "yellow," "rat" and so forth, were common. Assaults were sometimes made. Threats of "getting" a worker were frequent. Truckloads of workers were jeered at. Edward Chace is one of the picket captains who, in the opinion of the court, is entitled to credit for trying to tell the truth about what happened. Every other picket captain told stories of silent picketing so palpably contrary to all human experience and probabilities as not to have even the merit of plausibility.

A careful following of the whole evidence makes it clear beyond doubt that the primary aim of the picketing in these cases was to coerce and intimidate workers. Such is not a lawful means for the union to adopt.

It does not help to say that while violence occurred before the militia and sheriffs took control, the picketing thereafter was orderly. It undoubtedly was more orderly but this does not prove that it was not intimidating. Note the marked

increase of workers at Jenckes' since the restraining order of Judge Tanner, April 29; over 800. Obedience to rules of militia and sheriffs was grudging. When the size of the groups was cut down by the sheriff's orders at the mills, the groups turned to house-picketing with greater intensity. At the houses there was not the same restraint in the form of officers of the law as there was at the mills. Ninety houses of workers were picketed; insulting placards were posted on the houses and these things were kept up until the worker quit. Many workers were girls' and women. That such a type of picketing was intended to and did constitute intimidation is clear. It is not sufficient for respondent leaders of the union to give general instructions in regard to peaceful and silent picketing, turn the pickets out under assigned captains and then because not personally participating repudiate the excesses of the pickets.

Kroger & Co. vs. Retail Clerks, 250 Fed. 890 at 896 Mo. (1918).

Southern Ry. vs Machinists' Local Union, 111 Fed. 49 at 54 Tenn. (1901).

Charleston Drydock & Machine Co. vs. O'Rourke, 274 Fed. 811 at 812 S. C. (1921).

Local Union No. 3135 vs. Stathakis, 135 Ark. 86 at 90 (1918).

Same case, 6 A. L. R. 894 at 896.

Michaels vs. Hellmah, 183 N. Y. Supp. 195 (1920).

Newport Costume Co. vs. Schlesinger, Law & Labor, Vol. 3, No. 12, P. 288 (Dec. 1921).

s. c. New York Law Journal, (Nov. 1, 1921).

Thomas admits advising the pickets to go in groups. That their excesses came to his knowledge, we are convinced, McMahon assumes full responsibility for

Thomas and got reports from him and some from picket captains. McMahon and Thomas both must be held, as their counsel admits, responsible for the natural consequences of their acts. It seems to us with their intelligence they could not fail to expect the probability of excesses when a group of picketers start out with the sense of wrong that striking men and women felt, and in which feeling union leaders fully joined. No condemnation of excesses was made at the daily union meeting and the conclusion is inevitable that, as Gray substantially puts it, "all they wanted was to get the workers to quit and they would not picket their houses again; that he had had too much experience to make direct threats."

To us the form of picketing in these cases seems to be the "dogging" which the Supreme Court has found improper. It surely is not persuasion, communication or observation as to who is working. Those are the legitimate objects of what is called peaceful picketing.

It is only fair to respondents to note that their testimony and actions show a desire and intention to obey the law. They complied with the requests as made by the militia; they complied with the requests of the sheriff; they obeyed the injunction. Neither the sheriffs nor militia, however, attempt to establish the private rights of individuals. They are merely attempting to preserve public order.

The legal rights of the parties have been before stated in this opinion and need not be restated. McMahon, particularly, impressed the court with his candor and force of character. Thomas is also a man of great vigor. When such men cannot control the excesses of group or mass picketing, it is a pretty certain indication that there is something inherently difficult, if not impossible, in conducting so-called peaceful picketing

by masses or groups of men, and that such picketing does not give to the person who wants to work during a strike the opportunity to exercise the free choice which he is entitled to under the law.

The union is entitled by fair means to win the strike if it can. It is not entitled by intimidation to deprive a non-union man or woman desiring to work, or his or her right of free choice. The type of picketing hitherto conducted in these cases, we find illegal.

The question remains whether any picketing should be permitted in future. Mr. Justice Holmes in *Vergelhan vs. Guntner*, 167 Mass. 92, at 106, says: "The true grounds of decisions in these cases are considerations of policy and social advantage."

The present textile strike is a large proposition, involving numerous mills, and according to respondents' counsel, 10,000 to 15,000 workers. That violent clashes have occurred, and that the militia has been called out is a matter of public knowledge; a homicide after a mob of 400 or 500 pickets had chased the Mayor of Pawtucket in front of the Jenckes plant; pushing and jostling the workers; cases of violence, such as assaults, bomb and stone throwing, breaking windows, together with placarding houses and posting offensive circulars, have occurred.

The evidence does not trace these acts to respondents' pickets. Such acts are seldom directly traceable to any one person, but such acts of public disorder are well nigh inevitable accompaniments of a high state of public feeling during such a strike as the existing one. Strikers feel very bitter sentiments against the complainant and those who continue to work. It is not surprising that the picketing was accompanied by violence. The only object of permitting

any kind of picketing would be to allow observation and persuasion; as respondents' counsel puts it—to find out who were working and where and why. As such was never the object of the picketing hitherto, in our view of the evidence, we see no reason to apply any different doctrine from that applied by *Hahn, J.*, in *Falls Yarn Mills vs. United Textile Workers, Local 1230, et al.*, April 22, 1922, Eq. No. 5364, Rescript of Superior Court, p. 821.

"If picketing is accompanied by violence or intimidation, the injunction will run not only against such acts, but will run against all picketing under the theory that where the complainant's rights are once violated or abused, the courts are justified in stopping its further exercise in that particular case."

Authorities for such a ruling were cited in that case. In addition to these, see also

Pacific Coast &c. Co. vs Dist. 100 U. M. W., Washington, Law & Labor, Feb., 1922, p. 42.

Welitsky vs. Doe, N. Y. Law & Labor, Sept., 1921, p. 208.

Pre-Catolan, Inc. vs. International Federation of Unions, Law & Labor, Apr., 1921, p. 188.

Same case, 188 N. W. Supp. 99.

Holyoke Machine Co. vs. Palmer, Mass. Mar., 1921, Law & Labor, p. 65.

Compare also *Amer. Steel Foundries vs. Tri-City &c. Council*, supra.

Kueffel & Esser vs. International Assn. of Machinists, et al., supra.

In the court's opinion the preliminary injunction should run against all picketing.

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Rhode Island Law Record

Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 38

JUNE 23, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JUNE 26, 1922

52916 G M & H	Arnold Realty Ca. vs Wm. K. Toole Co.	G J S
P354 P & D	Hilda Sankey vs Pawtucket Amusement Co.	
M P 675 West	C. M. Atwood vs Harold B. Atwood et al	
Eq5888 P C J	Harry Hazen vs Bessie F. Bucklin et al	J L J
Eq5402 J B L	E. F. Hamilton vs Robert J. Steere	
Eq5891 K H & F	M. Santoooyian vs K. Nalbandian et al	

TUESDAY, JUNE 27, 1922

Eq5893 Gorman	Paul A. Picerne vs Frank Gross
Eq5896 W & G	Susie A. Connors vs Albert F. Connors

SUPREME COURT

Wenceslao Borda	}	Ex.&c.No.5589
v.		
Avice Weed Borda		

OPINION

(Before Hahn, J., Below)

SWEETLAND, C. J.. The above entitled cause is a petition for divorce in which the respondent availing herself of the statutory provision in that regard has filed a motion in the nature of a cross petition in which she asks for the affirmative relief of an absolute divorce from the petitioner.

The petitioner has not presented his petition but after the filing of respondent's said motion has sought to discontinue. This the petitioner was not permitted to do, and thereby impair the respondent's right to have a hearing and determination upon her motion in the nature of a

cross petition. Borda v. Borda, 43 R. I. 384.

The respondent's motion was heard in the Superior Court before Mr. Justice Hahn, who entered his decision granting the respondent an absolute divorce from the petitioner upon the grounds that the petitioner was guilty of extreme cruelty toward the respondent, of adultery, and of gross misbehavior and wickedness repugnant to and in violation of his marriage covenant with the petitioner, and that he consorted with another woman, and that he caused the registration of the birth and the making of the baptismal record of a child as that of himself and the respondent when said child was not that of the respondent.

At the hearing before Mr. Justice Hahn the petitioner appeared by counsel and although he did not testify or present evidence in defence, he did contest the granting of the respondent's motion by the cross-examination of her wit-

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nesses and by numerous objections to the rulings of said justice made at the hearing; his exceptions to which rulings he has pressed before us.

Prior to said hearing the petitioner had been enjoined by the Superior Court from prosecuting a proceeding for divorce from the respondent which he had instituted in Porto Rico after the filing of his petition and the motion of the respondent... Although it appeared to said justice that the petitioner had violated the decree of injunction and was in contempt, nevertheless no objection was offered by the respondent and the petitioner was given a full opportunity to present such evidence as he desired in support of his original petition and in defence of the cross petition of the respondent.

The petitioner excepted to the rul-

ings of said justice in which he refused to dismiss the respondent's motion in the nature of a cross petition. The petitioner contended in the Superior Court, and also before us, that the evidence shows that the respondent was not a domiciled inhabitant of Rhode Island for two years prior to the filing of said motion and hence that the Superior Court did not have jurisdiction to hear and grant said motion. The exact domicile of the petitioner at the time of filing his petition is somewhat uncertain. He clearly was not a domiciled inhabitant of Rhode Island. He did reside for portions of the year in Porto Rico but the evidence supports the finding of the justice that the petitioner was, as he himself alleges in his petition, a resident of the city of New York. The respondent before her marriage to the petitioner

had been a resident of the town of Narragansett. When, as she claims and as said justice found, she was forced to leave the petitioner in 1916 because of his cruel treatment of her, she returned to Narragansett, where she owned a house which she occupied and where she had lived for about three years and a half just before the filing said motion. The evidence warranted the finding of said justice that for more than two years prior to filing her motion in the nature of a cross petition the respondent had the intention of making the town of Narragansett her permanent residence and that she was a domiciled inhabitant of this state within the requiremens of the statute. The petitioner being without a domicile in this state was obliged to rely upon the domicile of his wife in order to give the Superior Court jurisdiction over his petition for divorce and in said petition he made oath that the respondent has been "a domiciled inhabitant of the State of Rhode Island and has resided in said state, to wit, in the town of Narragansett, in Washington county, for a period of more than two years next before the preferring of this petition."

The petitioner excepted to the decision of said justice that the petitioner had been guilty of extreme cruelty towards the respondent. There was no evidence before said justice of physical violence upon the part of the petitioner toward the respondent but there was shown a course of conduct on the petitioner's part, wilfully and maliciously persisted in, which naturally resulted in causing in the respondent wretchedness of mind affecting her health and making it impossible for her to longer endure conjugal relations with the petitioner. This court has departed from the doctrine of earlier cases requiring the evidence of physical violence or of threats of such violence to establish a charge of extreme cruelty in divorce. Grant vs. Grant, 44 R. I. 169. The justice was

warranted in finding that the respondent was in ill health from the time of her marriage to the petitioner to the time of their separation; that she was very fond of her daughter, the issue of a former marriage, and also of a sister and a daughter adopted by her before her marriage to the petitioner; that the respondent assisted these three women financially; that contrary to the wish of the petitioner she intended to provide liberally for them in any testamentary disposition that she might make of her extensive property; that the petitioner persisted in most cruel and vile attacks upon the moral character of these women, especially the respondent's daughter and sister; that he did this in letters written to the respondent and also in conversations with others in her presence, in public places, in hotels and restaurants in New York and on numerous occasions at their home in Porto Rico in the presence of servants and guests who were of the highest political and social standing in the island. These statements do not appear to have been made by the petitioner in anger but with a malicious intention of humiliating the respondent and destroying her peace of mind. The respondent testified that she had destroyed most of the letters of this nature which the petitioner had written to her. One letter is in evidence as an exhibit in the case. The statements in this letter as to the character of the respondent's daughter and sister are unspeakably vile, particularly with reference to that of the daughter. The continued abuse of those who were very dear to her can have had no purpose save to cause pain to the respondent. This deliberately cruel conduct of the petitioner undoubtedly affected the already impaired health of the respondent, as she claims that it did, and as her physician testified would be its natural result.

The petitioner excepted to the decision

of said justice that the petitioner was guilty of adultery. The justice was warranted in finding from the testimony that for a considerable period in September and October of 1917, the petitioner and a woman, who was not his wife and was then known as Mrs. Borden, were living at the same hotel in New York City, and were very closely associated there; that he consulted with a physician in regard to her condition and was present in her room at the hotel when said physician attended her; that on November 1, 1917, this woman was delivered of a male child at a private lying-in hospital in New York City; that the petitioner was a frequent visitor at said hospital during her confinement and delivery, and was much interested in her condition; that he gave to the physician in attendance upon the woman the information from which the certificate of birth was made for public record; that he then stated that he was the father of the child and that the said woman was his wife, Avice Weed Borda, this respondent; that shortly after the birth, the mother and child, accompanied by a nurse, returned to the hotel where they and the petitioner continued to live for several weeks; that the petitioner personally sought a baby specialist to attend the child; that the child was then placed by the petitioner in the care of the petitioner's aunt, in whose family the child has lived up to the time of the hearing; that the petitioner took the child, the petitioner's aunt and an intimate friend in a cab to a Catholic church in New York City and there, on December 6, 1917, he caused the child to be baptized as Wenceslao Borda, Jr., that by his invitation said friend became the godfather of the child and the petitioner's aunt became the godmother; that he caused the baptismal record to be made in the church that he was the father of said child and that this respondent was the mother; that the petitioner has visited the child frequently and has had him

brought to the petitioner's apartments in New York City and to his residence in Porto Rico; that he exhibited marked affection for the child and referred to him as "his Billy," and as "his child." The above facts were unknown to the respondent until after the filing of this petition for divorce against her. All of these facts appeared in the depositions of witnesses taken a number of months before the hearing in the Superior Court. At the taking of these depositions the petitioner was represented by counsel who cross-examined the witnesses. To these serious charges the petitioner has offered no answer, neither by his own testimony nor by that of other witnesses. Because of the mass of circumstantial evidence supporting it, the justice was warranted in accepting as true the admissions of the petitioner as to the paternity of the child Wenceslao Borda, Jr., born November 1, 1917, and in fining that the petitioner was guilty of adultery with the mother of the child, known as Mrs. Borden, during the early part of the year 1917.

Petitioner's counsel suggests that the petitioner's admission that he was the father of said child should be entirely disregarded because he coupled with that admission with the statement unquestionably false that the respondent was the child's mother. The petitioner will not be permitted for his own purposes thus to invoke the maxim falsus in unc, falsus in omnibus, a maxim applicable in attacking the credibility of an adversary witness. The object of the petitioner in causing the respondent falsely to be recorded as the mother of this child can only be inferred from the testimony. The inference may be drawn that regardless of his wife's rights or wishes he desired to procure a record of legitimacy for a natural child of his that he had decided to acknowledge, or the inference of said justice is warranted that the purpose of the petitioner was

in this way to lay the foundation for a claim in favor of himself and his child upon the respondent's estate in case of her decease. Whatever may have been the petitioner's object his conduct was reprehensible and without reasonable and convincing explanation warrants the conclusion that it had an evil purpose. Although his statements that the respondent was the mother of the child were false, such untruth does not negative his own admission that he was the father and hence guilty of adultery, which is supported by the circumstances noted above.

Counsel have argued to us that the conduct of the petitioner in connection with the birth of the child, his statements for the purpose of public record and baptism, and his subsequent relations with the child do not have the significance that said justice has given to them, but that these circumstances should be regarded merely as indications of a purpose in the petitioner to adopt as his own the child of other parents. The petitioner has not seen fit to come into court and make this explanation for himself. Counsel have stated to the court that they are not in his confidence in that regard and are unaware of the real meaning of the petitioner's action. The statement and admissions of the petitioner, himself, and what said justice has properly found to be the natural meaning and intent of his conduct, should be given greater weight than the unsupported conjecture of counsel.

The petitioner has excepted to the decision of said justice that the petitioner was guilty of gross misbehavior and wickedness repugnant to and in violation of the marriage covenant in consorting with another woman and in causing the respondent to be recorded in the public records of the city of New York as the mother of the child of another woman and in causing said child to be baptised as the lawful child of himself and the

respondent. The evidence fully warrants these findings. The first of these offences against the marriage covenant is licentious in its character, the last two, in their painful effect upon the mind and feelings of the respondent, partake of the nature of cruelty. They thus conform to the requirements for such causes of divorce as the same were set out by this court in *Stevens v. Stevens* 8 R. I. 557.

The petitioner excepts to the rulings of said justice in receiving the depositions, taken in this state with all legal formality before a standing master in chancery but not upon the special reference and order of the court. The statute provides, Section 40, Chapter 292, General Law 1909, that "In all divorce proceedings the testimony shall be given in open court . . . (3) unless the deposition be taken before a standing master in chancery." The petitioner contends that a proper construction of this statute requires that, before a standing master in chancery can have authority to take deposition to be used in divorce proceedings, the taking of such depositions must be referred to him by a special order of the court in accordance with the ordinary practice in equity concerning reference to masters in chancery. Such has not been the construction which in practice has been placed by the court upon this statutory provision since its enactment. Depositions have been received without question when taken with legal notice and formality before a standing master in chancery upon the request of a party acting through his counsel. We see no sufficient reason for disturbing this well-established practice. This exception should be overruled.

The petitioner excepted to the rulings of said justice at the hearing admitting in evidence a copy of the birth certificate and the corrected birth certificate of said child recorded in New York City, and also a copy of the baptismal record of

said child made in said Catholic church, in New York City. There was no error in these rulings. Said certificate and corrected certificate were properly received by the court in connection with the testimony of the physician who had made and filed said certificates; and the copy of the baptismal record was properly received in connection with the testimony of the priest who had made the record.

We have examined the large number of exceptions taken by the petitioner to the rulings of said justice in the admission of testimony and we find no merit in any of them.

The petitioner has appealed from the decree of the Superior Court enjoining the prosecution of the divorce proceedings in Porto Rico. There is no merit in said appeal. The decree of the Superior Court is affirmed and our affirmation of the same is ordered certified to the Superior Court.

All of the exceptions of the petitioner are overruled and the case is remitted to the Superior Court for further proceedings in accordance with the decision of said justice.

For petitioner: Knauer, Hurley & Fowler.

For respondent: Tillinghast & Collins.

SUPREME COURT

E. A. Stevenson & Co. }
v. } Ex.&c.No.5559
Antonio F. Cappelli }

RESCRIPT

(Before Doran, J., Below. After Judge Doran's death Justice Barrows denied a motion for a new trial pro forma).

This is an action of assumpsit for breach of contract. The case was tried in the Superior Court before a justice

thereof sitting with a jury and a verdict was rendered for the plaintiff in the sum of \$2090.

The justice of the Superior court presiding at the trial of the case having deceased, the defendant's motion for a new trial was later denied pro forma by another justice of said court.

The case is now before us upon the exceptions of the defendant without the approval or disapproval of the verdict by the trial justice. The exceptions upon which the defendant now relies raise two questions: (1) Did the trial court err in striking out the testimony of Herbert J. Higgins as to the market price of oil at the time of the alleged breach of contract, and (2) Was the amount of damages awarded by the jury excessive.

The plaintiff is a foreign corporation any artificial coloration whatever and oil and kindred products and also in the manufacture of nut margarine or nut butter. Cocoanut oil is a necessary ingredient in the manufacture of this product and forms the basis of the process used therein.

Nut butter or nut margarine, as sold in the trade, is of a white color without any artificial coloration whatever and its color is a very important element in its merchantableness. Oil of too dark a color cannot be successfully employed.

In the fall of 1919 the defendant and Paul Castihlioni, a witness in the case, organized the American Nut Butter Company, a Rhode Island corporation, for the purpose of engaging in the manufacture of nut butter or nut margarine and kindred products.

On October 11, 1919, the defendant entered into a contract with the plaintiff company for the purchase of 150 barrels of cocoanut oil.

On December 3, 1919, prior to the delivery of this order, the defendant entered into a further contract with the plaintiff for 500 barrels of the same oil

to be delivered from January to March, 1920.

The oil under the first contract was shipped during the early part of January, 1920, and paid for by the defendant. Owing to the difficulty in obtaining freight, the defendant's company was unable to obtain and install its machinery until March. Meanwhile the shipment of oil under the first contract had been kept in storage. Nut butter manufacture was commenced by defendant's company at the end of March and then, for the first time, oil under the first contract was used.

On April 8 the American Nut Butter Company wrote the plaintiff that their chemist had made a test of the oil and found it too dark for use in the manufacture of nut butter. Meanwhile plaintiff had shipped a carload of oil consisting of 100 barrels under the second contract, and the same arrived in Providence with sight draft bill of lading in accordance with the terms of said contract. Thereupon defendant's company wrote to plaintiff on April 12, 1920, as follows: "Please release car of oil. We feel that a test will be necessary, owing to the poor condition of the previous lot we got from you."

This request was refused by the plaintiff company and the defendant, in order to save his credit, paid the draft and received the shipment of 100 barrels, leaving a balance of 400 barrels still to be delivered under the contract. At the same time defendant's company wrote plaintiff under date of April 14, 1920, as follows: "We have paid draft to-day, do not send any more oil until further notice, we are getting an analysis of the car just taken and if the same is not satisfactory, our chemist advises us, to reject the order."

Finally, on April 27, 1920, defendant's company notified the plaintiff that owing to the unsatisfactory condition of the oil already received they would refuse to

accept any further oil under the contract of December 3.

It is not disputed that the plaintiff company knew that the oil was purchased to be used in the manufacture of nut butter and nut margarine and that there was an implied warranty that it would be reasonably suitable for that purpose and of a merchantable quality.

There were two issues submitted to the jury: (1) Whether or not the oil was suitable for the purpose for which it was sold; and (2) the amount of the damages suffered by the plaintiff. The testimony as to the quality and suitability of the oil was conflicting. That question has been determined by the jury in favor of the plaintiff and the defendant does not claim that a reversal of the verdict would be justified on that ground.

This leaves for our consideration the ruling of the trial court in striking out certain testimony of the witness Higgins as to the market price of oil on April 27, 1920, that being the date when the defendant declined to receive any more oil under the contract of December 3, 1919; and the further question as to whether the amount of the damages was excessive.

Mr. Higgins, called as a witness by the defendant, testified from his recollection that the fair market price of oil, of the quality in question, delivered in Providence about the end of April, 1920, was 22c per pound. On cross-examination he was asked what basis he had for his testimony in that regard and produced two contracts, one of April 1, 1920, in which the price was 21½c delivered and the other of May 18, 1920, in which the price was 21½c delivered.

The plaintiff asked the court to strike out the testimony of this witness "as to the price of cocoanut oil at the date of this cancellation of contract." Upon this motion the court ruled as follows: "What you say about his testimony concerning April is granted. I grant the

motion. The only qualification of that is this: If the jury believe his talk about his memory they can weigh it."

While the trial justice may not have expressed himself in the most delicious manner it is reasonably clear that it was his intention to strike out that portion of the testimony of the witness Higgins relating to the contract of April 1, presumably as being too remote, and to leave to the consideration of the jury his previous statement that the price of oil in Providence at the end of April, 1920, was "about twenty-two cents."

We cannot say that the trial court was clearly wrong in eliminating from the record the reference of the witness to his contract of April 1, 1920, on the ground that such contract was too remote to assist the jury in fixing the price of a commodity on April 27, 1920, which, in common with many other articles, was subject to fluctuation in price.

The only item of damage to the plaintiff is the actual loss sustained by the refusal of the defendant to accept 400 barrels of cocoanut oil, being the balance of his purchase under his contract of December 3, 1919.

The jury had found as a fact that the oil covered by the contract was of a quality suitable for the purpose for which the defendant intended to use it. The plaintiff is therefore entitled to recover the difference, if any, between the contract price of the oil and the market value on April 27, 1920, the day when the defendant canceled the contract.

The contract price was 21½c per pound. Three witnesses testified as to the market price of oil on April 27, 1920.

Mr. Miller, the sales manager for the plaintiff, first stated that he could not say what competitors' prices were for oil on April 27, 1920. He referred to the price of edible cocoanut oil as quoted by the Journal of Commerce on that date at 19½ to 20c. This quotation does not apparently include transportation charges

and would not therefore be the market price in Providence, nor does it indicate that it covered the price of the barrel. In fact, Mr. Miller says: "I don't know whether this was a bulk price or barrel price."

Mr. Miller further testified that the price quoted in the newspapers was the price of the refiner to the jobber or, in other words, the wholesale price. He goes on however and says that the defendant was a jobber and could procure oil as cheaply as anyone. The defendant does not appear to have been a jobber put a purchaser of oil for use in the manufacture of nut butter and nut margarine. Beside it seems improbable that a refiner would sell to a consumer at the same price that he would sell to a jobber or middleman. Mr. Miller further testified, after looking over some contracts made by his company about this time, one bearing date April 22, 1920, and the other April 29, 1920, that the market value of a Providence delivery would be 20¼c. Later he admitted that a letter written by the plaintiff to the American Nut Butter Co. indicated that the market price on April 22, 1920, was 21c. The contract of April 29, 1920, to which the witness also referred was for 20¼c per pound but that price did not include freight charges which must be added to make up the market price at Providence.

Mr. Miller also admitted that it was not unusual for the plaintiff company to make sales at 21¼c when the market price was 22c and that under some conditions larger concessions were made.

We think that upon the whole testimony the damages awarded by the jury are somewhat excessive.

The exception of the defendant to the ruling of the trial court denying his motion for a new trial is sustained. The other exceptions of the defendant are overruled. The case is remitted to the Superior Court with direction to give the defendant a new trial unless the plain-

tiff shall remit so much of said verdict as is in excess of \$1520, on or before June 24, 1922, and in case such remittitur is so filed the Superior Court is directed to enter judgment for the plaintiff in said sum of \$1520.

For Plaintiff: Gardner, Moss & Haslam.

For Defendant: Wilson, Church & Curtis.

SUPREME COURT

Rose Berger
v.
Samuel Berger } Ex.&c.No.5585

OPINION

(Before Sumner, J., Below)

STEARNS, J. The proceeding is by petition brought by Rose Berger to vacate a final decree in divorce which was entered in the Superior Court February 5, 1921. After a hearing the petition was granted by a justice of the Superior Court on the ground that the respondent was guilty of fraud in causing the final decree to be entered. To this decision the respondent duly accepted and the cause is before this court on respondent's bill of exceptions.

The petition for divorce was filed by the petitioner, Rose Berger, in the Superior Court November 26, 1918. The grounds alleged therein were extreme cruelty and neglect to provide. On September 5, 1919, after a hearing, decision was given for the petitioner. On September 27, petitioner was permitted to amend the petition for divorce by adding thereto a prayer that she be awarded the custody of a minor child and on the same day the custody of said child was awarded to the petitioner. In the summer of 1920, petitioner and respondent became reconciled. They secured a

dwelling house in Providence and there lived together as man and wife until February 11, 1921, when the respondent abandoned petitioner. On February 5th, six days before he left petitioner, the respondent went to the office of an attorney who had first represented the petitioner in the divorce proceedings, and told the attorney that he was going away and that he wanted a copy of the final decree in the divorce proceedings. The attorney told him to go to the office of the clerk of the Superior Court and there secure a copy of the decree. Respondent thereupon left the attorney's office and in a short time returned, and informed the attorney that a final decree had never been entered and that the petitioner Rose Berger desired to have a final decree entered. At some stage in the divorce proceedings, Mrs. Berger had secured another attorney to conduct her cause and, at the request of respondent, the attorney first mentioned telephoned to the attorney who had last represented Mrs. Berger and this attorney upon being informed of the alleged request of the petitioner, thereupon on the same day, February 5th, procured the entry of the final decree in divorce. This attorney testified that the petitioner had requested him to have the final decree entered some time after the decision was made but before the six months had elapsed when final decree was in order for entry (Sec. 19, Chap. 237, Gen. Laws), and that he had the decree entered, as he supposed at the time, in accordance with petitioner's wish. In fact however, the decree was entered without petitioner's knowledge or consent.

It further appears that before petitioner went to live with her husband again, she was assured by him that the divorce proceedings were to be stopped and that there would be no divorce. Upon discovering the facts petitioner on

April 2, 1921, began proceedings to vacate the decree.

The petition to vacate a final decree in divorce is an independent petition and in effect is a new and original proceeding. The objection to the decision of the Superior Court thereon is properly raised in this court by a bill of exceptions. *Johnston vs. Johnston*, 37 R. I. 362.

The final decree in this case was procured by the fraud of the respondent practiced on the court and on the petitioner. The petitioner has acted promptly and without delay and the rights of an innocent third party are not involved. Such being the case the right of the Superior Court to vacate the decree is clear. *State vs. Sampson*, 20 R. I. 354; *Sampson vs. Sampson*, 223 Mass. 451. The principle involved is so well settled as to make other citations of authority unnecessary. The argument is made that petitioner is not acting from good motives and that as she had obtained all that she asked for in her divorce proceedings she should not now be permitted to change her mind. There is no evidence in regard to the motives of the petitioner. But if the petitioner had desired and authorized her attorney to secure entry of the final decree the court could not properly have entered it, as the resumption of marital relations with her husband after the decision and before entry of final decree was a condonation of the offence of the husband. One of the reasons for the delay required by the statute in the entry of a final decree is to give the parties an opportunity for reconciliation. As a reconciliation had been effected in this case, it would be a fraud upon the court for either party to procure the entry of final decree. The State has an interest in the maintenance of the family relation and the law should and does require good faith in the parties and just cause to warrant the granting of divorce. The respondent was guilty

of gross and contemptible fraud. To sustain his contention would be to make the court an instrument in effecting his fraud. The vital consideration is the fraud upon the court. The motive of petitioner in exposing the fraud is not material.

The exception of the respondent is overruled, and the case is remanded to the Superior Court for further proceedings.

For Petitioner: Lee & McCanna and George Sheehan.

For Respondent: Robinson & Robinson.

SUPREME COURT

Laura I. Creaser . . }
v. } Equity No. 534
Laura J. Thatcher }

RESCRIPT.

(Before Tanner, P. J., Below)

This is a bill in equity to set aside a deed whereby the complainant conveyed her real estate to the respondent. After a trial before the Presiding Justice of the Superior Court upon bill, answer, issues of fact, and oral proof, a final decree was entered dismissing said bill. The complainant has duly brought the cause to this court upon her claim of appeal and states as reasons therefor that said final decree is contrary to law and equity and to the evidence and the weight thereof.

The bill of complaint alleges that on the 16th day of April, 1820, the complainant was seized in fee simple of certain real estate situated in the city of Providence; that she was then critically and dangerously ill; that she was in an extremely feeble condition both mentally and physically; and that she was unable

to consider or decide any business or other matters. She avers that the respondent, without any request from her, procured an attorney and gave him instructions to write a deed conveying complainant's real estate to her; and that the attorney, acting upon said instructions and supposing them to be the complainant's, prepared a deed and went to her bedside and had her sign her name to said deed. She further avers that when she recovered from her sickness and regained her usual health and strength the respondent ordered her out of the house and that she vacated the house in January, 1921. The complainant also avers that when she signed said deed she did not realize what it was; that she did not have proper advice of her counsel; that her signature to the deed was procured by duress of the respondent and the attorney she had employed for this purpose; and that she would not have conveyed said real estate to the respondent but for the wrongful and fraudulent acts of the respondent.

The respondent in her answer admits that the complainant executed and delivered the deed but denied that there was any duress or fraud in procuring it or in the employment of an attorney to accomplish said purpose; and she avers that the complainant made the deed of her own free will and for a definite purpose. She further avers that the complainant was in the full possession of her faculties and had the advice of an experienced and reputable attorney who had been customarily employed by her in the transaction of her legal affairs prior to this time; and that he drew the deed for her and took her acknowledgment thereto without any duress or fraud being committed by him.

The warranty deed in question was introduced in evidence by the complainant. It is dated April 16, 1920, and acknowledged the same day before a notary public who was the attorney who drew the

deed. The deed was received for record April 21, 1920, at 9:38 o'clock a. m. and duly recorded.

On the same day, April 16, 1920, the respondent executed and delivered to the complainant a life lease of the property conveyed by said deed and this lease was recorded April 21, 1920, at 9:39 o'clock a. m., as appears by the certified copy of the record of said lease introduced in evidence as respondent's exhibit 1.

The respondent is a niece of the complainant and helped to take care of her during her illness.

The Presiding Justice found that there was no direct evidence of fraud or duress and that the preponderance of the evidence proved that there was no fraud or duress.

The testimony as to the physical condition of the complainant at the time of the execution of the deed is conflicting, her physician testifying that at no time was she critically ill and that her mental faculties were not impaired. The attorney who drew the deed testified that he considered her physical condition as very critical. The attorney had acted as such for the complainant for many years and called to see her in response to a telephone summons and found her in bed and very sick and weak. He talked with her and received the impression that she wanted deed drawn and after writing the deed he returned to her house and she signed it while in bed and acknowledged it before him as a notary public. He testified that her signature on the deed is not much different from her ordinary signature and just about as steady. An examination of her signature on the deed shows it to be very well written and steady. The respondent testified that the petitioner had promised to deed the property to her on the previous Thanksgiving day with restrictions as to the life lease of it; that when the attorney brought the deed to the house the complainant was able to read and had

a book and her glasses opposite the bed; and that when the deed was presented to her she read it and signed it.

The complainant charges actual fraud on the part of the respondent and the attorney in procuring the deed. The charge must be proved or the bill will be dismissed. *Grant v. Wilcox*, 44 R. I. 94.

The court has duly considered the evidence in this case and is of the opinion that there is no error in the finding of the Presiding Justice. The complainant's appeal is dismissed, the decree of the Superior Court appealed from is affirmed, and the cause is remanded to that court for further proceedings.

For Complainant: W. R. Prescott.

For Respondent: Daniel E. Geary.

SUPREME COURT

Israyel Kosroffian	} Ex.&c.No.5388
v.	
Thomas H. Donnelly	

RESCRIPT

(Before Hahn, J., below.)

This is an action of trespass on the case to recover damages for personal injuries which the plaintiff alleges that he received by reason of the negligence of the defendant.

The cause was tried before a justice of the Superior Court sitting with a jury and resulted in a verdict for the plaintiff for \$675. At the conclusion of the evidence the defendant moved for the direction of a verdict in his favor, which was denied by said justice. The cause is before us solely upon the defendant's exception to the ruling of said justice denying the motion for direction of a verdict.

It appears that while the plaintiff was driving his horse attached to a wood wa-

gon on Broad street, near Trinity Square, in Providence, the defendant, who was operating an automobile proceeding in the opposite direction, suddenly turned his machine towards the plaintiff's wagon and struck it, whereby the plaintiff was thrown to the ground and as he claims was severely injured.

The defendant seeks to excuse his action by claiming that a man suddenly left the sidewalk and ran in front of his machine, thus creating an unexpected emergency in which to avoid injury to the man in front of his machine he suddenly swerved from his course thereby striking the wagon of the plaintiff. The defendant's motion to direct a verdict was properly denied. The state of the evidence presented questions fairly to be submitted to the jury as to whether the act of the defendant arose solely from his negligence or was occasioned by the unexpected emergency claimed; and further, if such emergency was found to have existed it was a question for the jury as to whether the defendant exercised the judgment and prudence that reasonably should be required of him when he unexpectedly found himself in such emergency. *Henderson vs. Dimond*, 43, R. I. 60.

The defendant's exception is overruled. The case is remitted to the Superior Court for the entry of judgment on the verdict.

For Plaintiff: McGovern & Slattery.

For Defendant: John P. Beagan and E. DeV. O'Connor.

SUPREME COURT

Maderight Mfg. Co.	} Ex.&c.No.5563
v.	
Max Charren & Son	

RESCRIPT

(Before Sumner, J., below.)

This is an action of assumpsit to recover payment for some scarfs sold by the plaintiffs to the defendants. The ac-

tion was tried in the Superior Court and upon the closing of the testimony the trial justice directed the jury to return a verdict for the plaintiffs. The defendants excepted to such direction and have duly brought the case to this court upon their exceptions.

It was admitted by the defendants that they purchased 25½ dozen scarfs from the plaintiffs as a job lot at the agreed price of \$9.00 per dozen. The defendants claimed that upon the receipt of the scarfs they found some of them mismatched and that they immediately returned these defective scarfs to the plaintiffs. The plaintiffs promptly notified the defendants by letter that the returned scarfs were not defective; that they had purchased the goods as a job lot and could not return the cheaper scarfs; and that they must keep all of the scarfs or return all of them. The defendants replied that they would return all of the scarfs and made a shipment which was received by the plaintiffs. Upon examination of this shipment, the plaintiffs found that all of the scarfs had not been returned and notified the defendants that they had retained 7½ dozen of the best scarfs.

This action is brought to recover payment for the scarfs retained by the defendants. The defendants offered to pay for the scarfs at the rate of \$9.00 per dozen, the job lot price, and the plaintiffs claim the regular price for which they sell them. One of the defendants testified that when a man sells goods as a job lot he sells them at a lower price than when he sells them as regular goods. This testimony is in accord with that of one of the plaintiffs. The plaintiff who sold the job lot of scarfs to the defendants produced his price list of the scarfs when sold in the regular course of business and testified that the price for the goods in question, when sold regularly, was the same from January 1, 1920, to October 15, 1920. The defend-

ants introduced no testimony to show that the plaintiffs had sold similar scarfs to those involved in this action, when sold in the regular way, at a less price than that testified to by one of the plaintiffs.

The plaintiffs are entitled to recover their regular price for the small quantity of scarfs retained by the defendants out of the job lot shipment, and, their testimony as to the regular price of the scarfs being uncontradicted, the trial justice properly directed the jury to return a verdict for the plaintiffs based upon the testimony proving the regular price of the scarfs retained by the defendants.

The defendants' exceptions relating to the admission of testimony are considered waived. All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiffs upon the verdict.

For Plaintiff: E. C. Stiness.

For Defendant: Robinson & Robinson.

SUPREME COURT

Stephen C. Harris, Et Al }
v. } Equity No. 543
Archer Greene, Et Al. }

QUINION

SWEETLAND, C. J. This is a bill in equity brought by the trustees under the will of Rufus Greene, late of Providence, deceased, praying for the construction of said will and for instruction relating thereto. The cause being in the Superior Court ready for hearing for final decree has been certified to this court for determination.

By the eighth clause of said will the testator provided for the distribution of the income arising from certain property placed in trust for the benefit of his wife and sons, and then directed as follows: "And when the youngest child of my youngest son shall have reached

the age of twenty-one years, then my said trustees are to divide, distribute and convey as in their judgment they shall deem best all said business capital, realty, profits, dividends and earnings equally to said male children and daughters born subsequent to the date of this will, the children of any deceased child taking his proportionate share of his father's and mother's realty and personalty." The testator had six sons who survived him. One of said sons has since died leaving issue and three have died without issue. Two sons, Archer Greene and Howard Greene, are now living. No child was born to the testator subsequent to the date of said will. Howard Greene is the youngest son of the testator and is now fifty-one years old. The youngest child of said Howard is one Richard D. Greene, who became twenty-one years of age on November 22, 1921.

Because said Richard D. Greene has reached the age of twenty-one years request has been made that the trustees now make a division of said trust estate under the provisions of the eighth clause of said will quoted above. Said trustees, however, doubt their authority to make division as requested and have brought this bill for the construction of said clause and for instruction. The trustees propound the following questions in their bill: "(a) Did the time for the distribution of the estate, provided for in the quoted paragraph of the eighth clause, arrive when Richard D. Greene, the youngest son of Howard Greene, became twenty-one years of age, that is to say on November 22nd, 1921? or (b) Is the distribution of the estate under the provisions of said paragraph to be postponed until it is no longer possible for the said Howard Greene to have children and his then youngest child reaches the age of twenty-one?"

In the construction of all testamentary

provisions the intention of the testator if it can be ascertained must govern. Such intention of necessity will be sought in the language of the provision, and nothing is to be inferred save what is a necessary implication. The testator clearly provided that the time of division and distribution of the trust fund in question should be "when the youngest child of my youngest son shall have reached the age of twenty-one years." Richard D. Greene is at present the youngest, and as far as has been made to appear, perhaps also the oldest child, of Howard Greene, the testator's youngest son. Does Richard D. Greene answer the description of the youngest child of Howard Greene within the meaning of that phrase in said provision? The law presumes that Howard Greene is capable of having children until his death, and until that event it can not be determined as to who will be his youngest child. In the absence of a specific provision to that effect, the testator can not be assumed to have meant the youngest child of his youngest son at any particular point of time during the life of that son, but the youngest child absolutely and without qualification. Question would have arisen as to the time of division and distribution if Howard Greene had died without having had issue or if his youngest child should not live to attain the age of twenty-one years. Neither situation has arisen and such questions are not before us; but the possibility that either may arise should not, in our opinion, lead us to the conclusion that the time for division was reached when Richard D. Greene attained his majority.

It has been suggested to us that the testator should not be presumed to have intended that the division of the estate held in trust might be postponed until twenty-one years after the death of the testator's youngest son and possibly un-

til twenty-one years after the death of the survivor of his sons. That is the effect of the testator's language in creating the trust. If we were permitted to conjecture as to his intention we might consider it as by no means improbable that the very result suggested to us was within the contemplation and intention of the testator. This will has been before the court on two previous occasions for the construction of certain provisions other than the one now before us. In *Robinson v. Greene*, 14 R. I. 181, the court, at page 188, said regarding the purpose of the testator: "Apparently, if we look into the will at large, the purpose of the trust was to tie up the property for the beneficiaries, giving them the rents and profits, and putting the corpus or principal beyond their control. In the case of the sons, the property is so tied up until the youngest son of the youngest son attains his majority, the apparent purpose being to postpone the period of distribution to a distant future."

In *Robinson v. Greene* 17 R. I. 771, the court was considering the provisions of a certain estate held in trust for the of the will as to the time of distribution benefit of the testator's daughters and the descendants of deceased daughters. The court found the provision to be in itself ambiguous, and the court was forced to consider other provisions of the will for the purpose of ascertaining its meaning. Among other provisions from which the court derived assistance was that in which the testator provided that said trust property should be divided and distributed "equally among said daughters and the children or grandchildren of deceased daughters share and share alike." From this the court said, "It is clear that he did not mean to postpone the division to the limit of a perpetuity, for what follows in the very clause in question provides for a division among living daughters." In the clause now under consideration the testator

provides that at the time of division the trustees shall divide, distribute and convey the trust property "equally to said male children and daughters born subsequent to the date of the will, the children of any deceased child taking his proportional share of his father's and mother's realty and personalty." It has been suggested to us that applying the reasoning of the court in *Robinson v. Greene*, 17 R. I. 771, we should find in the somewhat similar language the provision before us an intention to divide among living sons. Such finding might be of assistance if the time of distribution was doubtful. To this suggestion it should be said that we are not in the former position of the court. We are not called upon to construe an ambiguity. The time of division is plainly fixed, and the purpose of the testator was to delay division until that time. If any of his sons are then alive he intended that they shall share in such distribution together with daughters then alive, born subsequent to the date of the will, and with the children of deceased sons and deceased daughters, who were born subsequent to the date of the will. Only to that extent do we find the intent of a division among living sons of the testator.

Answering the request of the trustees for instruction we say that the time for division and distribution of said trust estate did not arrive when Richard D. Greene became twenty-one years of age, and that division and distribution is to division and distribution of said trust estate for Howard Greene to have children, and his then youngest child reaches the age of twenty-one years.

On July 23, 1922, the parties may present a form of decree in accordance with be postponed until it is no longer possible.

For Complainant: Henshaw & Sweetney.

For Respondent: Henshaw & Sweetney.

SUPERIOR COURT

Bulah Borum, p.a. }
 v. } No. 52,281
 William Chernick }

RESCRIPT.

SUMNER, J. Bulah Borum, a minor aged 13 years, has brought suit, by her next friend, to recover damages for the pain and suffering due to injuries, the result of an assault made upon her by the defendant.

The jury returned a verdict for the plaintiff in the sum of \$1085 and defendant has petitioned for a new trial on the usual grounds.

The plaintiff, a colored girl, at that time 12 years of age, in company with a dozen other girls and boys, was out celebrating Allhallowe'en. The girls were attired as boys and the plaintiff wore bloomers, her brother's shirt and cap. Plaintiff claimed that, while the party was in the vicinity of the residence of the defendant, he came out, punched her in the belly, threw her against the fence and then shook her against it, twisted her arm so that it broke, and then kicked her in the back.

Dr. Byron J. Brown, Jr., testified that she had a contusion over the base of the sacrum, also on the right side of the abdomen, and a fracture of the wrist upon which a splint was kept for four weeks.

The plaintiff's story is corroborated by see them spitting at him. She also testified to the main facts of the assault and the lack of provocation.

Officer Coyne testified that defendant admitted to him that he had pushed a girl, dressed as a boy, into the street.

Defendant testified as to the presence of the party of "boys," as he insists, in front of his house; that they spit in his

face, threw stones at him, that one stone hit him in the foot, and that they also used opprobrious language. He denies positively striking or pushing anybody. In fact, he says that none of them came up on the sidewalk, but that they were all in the street.

His daughter, aged 14 years, testified that the party were teasing her father and using bad language; that they were mostly in the road; that her father was chasing them away, and that she did not see them spitting at him. She also testified that she was trying to get her father into the house.

Sophie Kaplan, a girl 13 years old, testified as to this party of boys and girls following her and another girl into the vicinity of the defendant's house; that they were throwing stones, spitting and noisy; that they were half the time on the sidewalk and half the time in the street.

The Court feels that the jury were amply justified in bringing in a verdict for the plaintiff, but thinks that the amount fixed, \$1085, is excessive. The assault was a very violent one, and without any apparent justification as far as the plaintiff is concerned, as the defendant does not claim that she either threw stones, used bad language, or did any of the objectionable things to which he has testified. The defendant testified that he was a painter, but further than that there is no testimony as to his means. The jury were undoubtedly justified in awarding punitive damages, but the court feels that \$500 would be a sufficient amount under all the circumstances, and accordingly grants the petition of the defendant for a new trial unless the plaintiff shall, in writing, within ten days of the filing of this receipt, remit all of the verdict in excess of \$500.

For Plaintiff: Comstock & Canning.

For Defendant: C. Slocum Smith.

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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 39

JUNE 30, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Miscellaneous Calendar

SUPERIOR COURT

MONDAY, JULY 3, 1922

Eq.5897 R & R	Samuel Weener vs Prov. Leather Goods Co.
Eq.5898 R & R	J. C. Condon vs Temple Mfg. Co.
Eq.4886 E & A	Union Trust Co., Tr., vs R. I. Sub. Ry. Co., et al
Eq.5269 E & A	Central Union Trust Co. of N. Y. vs P. V. S. Ry. Co.
Eq.5668 E & A	Central Union Trust Co. of N. Y. vs C. St. Ry. Co.

WEDNESDAY, JULY 5, 1922

Eq.5900 G K & G	A. H. Hoppin et al vs Scotia Worsted Mills
Eq.5902 A G	S. E. Pond vs J. Torrey et al
Eq.5903 Com & C	J. A. Cross vs Mercantile Advance Co.
Eq.5906 W & G	W. Gooding et al vs Broadway Baptist Church et al
Assgt.198 G H & A	In re Assgt of Excias Vaillancourt
Eq.5907 J L C	G. Hail vs A. B. Comstock et al
Eq.5896 W & G	S. A. Connor vs A. F. Connor

SUPREME COURT

Industrial Trust Co.,
Admr.
vs.
James McLaughlin,
et al.

} Equity No. 550

OPINION

SWEETLAND, C. J. This is a bill in equity asking for the construction of certain provisions of the will of John McLaughlin, late of the town of Cumberland, deceased, and for instructions. The cause being in the Superior Court ready for hearing for final decree has been certified to this court for determination.

The will is inartistically drawn and was executed, June 9, 1913. At that time the testator had living a wife, Eliza

abeth McLaughlin, and three minor children, who are respondents here. In the Superior Court a guardian ad litem was appointed for said three minors. On January 25, 1915, another daughter was born to the testator, the respondent, Helen McLaughlin, for whom in the Superior Court a guardian ad litem was appointed other than that for the other three minors. Each of these guardians argued before the court in support of the interests of their wards, and has filed carefully drawn briefs. Without adding a codicil to his will, the testator died on March 18, 1917. In said will the testator named his wife, Elizabeth McLaughlin, and his brother, James McLaughlin, as joint executors and trustees. These qualified as executors and served for a time. They then resigned, and the complainant trust company was appointed administrator de bonis non

with the will annexed, has accepted the office and qualified as such.

The first question as to which instructions is asked is as to what share, if any, the respondent, Helen McLaughlin, takes in the estate of the testator.

In the will the testator devises to each of his three children, as part of his bounty to them, a specifically designated parcel of land with a house thereon. In the Superior Court evidence was introduced from which it clearly appears that these pieces of real estate given to his children were of practically the same value; that after the birth of Helen he purchased another parcel, known as the Budlong Farm, of about the same value as the other parcels; and that afterwards during his life, in the presence of his wife, the testator frequently referred to the Budlong Farm as a home which he had provided for Helen. He never changed his will, however, or took other appropriate action to carry his will into effect. In the absence of a testamentary devise, or a conveyance or declaration of trust in writing, signed by said John McLaughlin, Helen does not, by reason of the circumstances appearing in said evidence, obtain any special interest or share in the Budlong Farm. (Section 2, Chapter 253, Gen. Laws, 1909).

After a certain legacy and certain devises, the testator provided by his will that one-third of all the rest, residue and remainder of his estate should go to his wife, "and the remaining two-thirds to my children, the childrens' share, however, to be held in trust." Before us the parties have discussed as to whether Helen shares in this gift to the testator's children or whether as to Helen the testator should be held to have died intestate in accordance with the provisions of Section 22, Chapter 254, General Laws, 1909, which is as follows: "When a testator omits to provide in his will for any of his children or for the issue of a deceased child, they shall take the same share of his estate that they would have been entitled to if he had died intestate, unless it appears that the omission was intentional

and not occasioned by accident or mistake."

The complainant avers in the bill that "no provision for said minor daughter, Helen, was made by will or by codicil thereto." The language of the gift of two-thirds of the residue of the estate is not to the testator's children designated by name, nor does the testator in any other manner restrict the gift to his children alive at the time of making the will. Ordinarily such a gift as one "to my children," without more, is construed as a gift to a class in the absence of an intention to be gathered from the will that it is one to individuals. The fact that at the time this will was made Helen was as yet unborn is not a circumstance which alone would indicate an intention to restrict the right to share in the residue to the testator's three children then alive. A will speaks and takes effect as if executed immediately before the death of the testator. That is the general rule recognized in our cases. *Coggeshall v. Home for Children*, 1 R. I. 696; *Hazard v. Gushee*, 35 R. I. 438; *R. I. Hospital Co. v. R. I. Homeopathic Hospital*, 87 Atl. 177. Our statute also provides in Section 6, Chapter 254, General Laws, 1909, that every will shall be construed with reference to the real and personal estate comprised in it to take effect from the death of the testator unless a contrary intention appears in the will. The gift to the testator's children of a share in the residue of his estate, being immediately operative upon his death, the members of the class who come within the designation of "my children" are to be ascertained at that time, and the class includes all of the four children of the testator who survived him.

We answer the first question with regard to which instruction is sought by saying that the respondent, Helen McLaughlin, shares equally with her sisters and her brother in two-thirds of the residue of the estate under the provision of the sixth paragraph of the will.

By the second paragraph of the will the testator devised a certain dwelling house, barn and land to his wife and

further provided as follows: "I also give and bequeath to my beloved wife one-third of all the rest, residue and remainder of my property, mention of which property is more specifically hereinafter made, * * in the event of her remarriage after my decease I give to her the sum of five thousand dollars outright, instead of the one-third herein bequeathed to her, together with the house and land above bequeathed to her." In the sixth paragraph the testator provides: "Sixth. All the rest, residue and remainder of my estate * * I give, devise and bequeath one-third to my beloved wife and the remaining two-thirds to my children, the children's share however to be held in trust." Because of these two provisions for the widow, which are claimed to be repugnant, instruction is asked; "As to whether the bequest to Elizabeth McLaughlin, widow of said John McLaughlin, deceased, contained in the sixth clause of said will is effected or modified by the condition in the second clause thereof, or whether the bequest to said Elizabeth McLaughlin is absolute."

In behalf of the widow the rule of construction is urged that when a later clause in a will is repugnant to a former provision, the later clause, being the last expression of the testator's intention, must prevail. The two provisions in question are inconsistent. Each in itself is explicit. By the second clause one-third of the residue is given to the widow with a condition of defeasance in the event of her remarriage; in the sixth clause a gift of the same quantity is made without such condition. They each stand separate and distinct from the other. While we may conjecture that it is unlikely that the intention expressed in the second clause was forgotten or changed before the testator reached the sixth clause, there is no specific or general intent apparent in the will itself which will exclude that conclusion; and the same conjecture may be made with reference to any provision in a will which is plainly repugnant to an earlier provision. The rule of construction based upon the relative posi-

tion of inconsistent clauses should not be applied until an attempt has been made to reconcile such repugnant provisions and to give effect to each. In this matter, however, there is no construction which will uphold both these provisions. They cannot both express the testator's intention. The suggestion has been made that these two provisions be read together, but no assistance will be gained from that procedure, unless the provisions of the second clause be incorporated in the sixth and the court thus place a condition on the absolute gift which the testator has failed to impose. That would be an attempt to harmonize the provisions of a conditional and an absolute devise by destroying the later absolute gift. From the lack of a clue, contained in the will, as to the real intention of the testator it is impossible to reconcile these repugnant provisions and the later must prevail. We therefore advise the parties that the gift of one-third of the residue to Elizabeth McLaughlin is absolute.

The complainant further asks for instructions "as to the effect of the second paragraph of the fifth clause of said will providing for the sale of the testator's real estate, whether the sale contemplated by said paragraph may be made by private sale as well as by public auction, as to who is the proper person to make such sale and whether in making said sale special authorization from the court is necessary."

The second paragraph of the fifth clause is as follows: "The bulk of my property, consisting of wood lots, timber lands and tillage lands in the States of Rhode Island, Connecticut and Massachusetts, I request that all same be sold as soon as conveniently may be after my decease at public auction and the proceeds therefrom become a part of my general estate out of which the legacies herein bequeathed may be paid if necessary." In the seventh paragraph of the will is the following provision: "Seventh: I authorize my said executors and trustees to sell both real and personal estate at private sale or at public auction, and to invest and reinvest

said proceeds if in their judgment they deem it advisable." Giving effect, if possible to each of these provisions we are of the opinion that the "request" in the second paragraph of the fifth clause is directory merely as to the time and manner of the sale of said wood lots, timber and tillage lands, and that in the seventh clause power is given to the executor to sell said wood lots, timber and tillage lands either at private sale or at public auction as in their judgment shall appear advisable.

In making his will it was in the contemplation of the testator that his wife and brother should act in the capacity of executors of the will, as well as trustees of the fund of two-thirds of the residue for the benefit of the testator's children. Although in the seventh clause of this inartistically drawn will the "executors and trustees" are authorized to sell, we are justified in assuming that the scrivener and the testator had in mind the person who were to sell rather than the particular capacity in which they acted. It is plain that the testator desired and expected that his real estate other than that specifically devised should be converted into money as soon as convenient after his death, and of the money, comprising the residue, one-third should be paid to the widow and two-thirds retained by the widow and the brother in trust for the children. The sale of the real estate was to be made in furtherance of their duties as executors in settling the estate; the power to invest and reinvest was given to them as trustees to aid them in administering the trust for the benefit of the children. The offices of personal representative and trustee have now been separated. There is nothing in the will which indicates that the power to sell was given to the executors as individuals apart from their office. The complainant, as administrator de bonis non c. t. a., under the provisions of Section 26, Chapter 312, General Laws, 1909, succeeded to the power of the executors to turn the real estate into money for the purpose of administering the estate. That section is as follows: "Section 26.

Executors for the time being, or administrators with the will annexed, shall have the same power to sell, lease or mortgage, and make conveyance of real estate, as are given by will to the original executors, unless such powers be expressly given to such executors as individuals apart from such office, or provision to the contrary be made in the will."

As the power to sell the real and personal estate is specifically given to the executors by the testator, the complainant requires no special authorization for sale from the court.

We reply to the third request for instructions: That the complainant is the proper person to make sale of the testator's real estate, that such sale requires no special authorization from the court, and may be by private sale or public auction as the complainant deems advisable.

The parties on July 3, 1922, may present a form of decree in accordance with this opinion.

For Complainant: Huddy, Emerson & Moulton.

For Respondents: Cooney & Cooney.
Tillinghast & Collins and H. E. Staples.

SUPREME COURT

State of Rhode Island

vs.

Frank W. Coye
Real Estate Co.,
et al.

} Equity No. 545

OPINION

(Before Barrows, J., Below)

STEARNS, J. This cause is in this court on an appeal by complainant from a final decree of the Superior Court dismissing the bill of complaint. The subject matter of the present proceedings has now been for several years past the basis of much and varied litigation in law and in equity between the par-

ties The original bill of complaint was considered by this court, as appears and as reported under the same titles in 103 Atl. 484, and 107 Atl. 82. The bill of complaint having been amended as directed by this court, the cause was heard by a justice of the Superior Court on bill, answer, replication and oral testimony, on issues of fact. The prayer of the bill for a permanent injunction restraining respondents from obstructing and interfering with public travel upon the road known as the "Shore Road" in Westerly was denied and the bill was dismissed. The temporary injunction previously granted, however, was continued by the decree until the final determination of the cause.

The question is, was the evidence sufficient to establish the claim of the State that the public had a right to use the part of the "Shore Road" in question by reason of a dedication by respondent or by reason of an estoppel in pais? The vital facts are not seriously controverted, and the question is, What

In 1912 the State was engaged in relation to the legal effect of the evidence? constructing the "Shore Road" as a part of the State highway system. In September the work had progressed to a point on the highway adjacent to land of the respondents and it was manifestly desirable and advantageous to the public, the town and the respondents that the highway should be straightened at this point by building the highway for a certain distance through farm land of the respondents. The town and respondents had failed to come to an agreement in regard to the terms whereby the desired change should be made, but after a conference between the town committee, the agent of the respondents and a Mr. Bristow, the engineer supervising the construction of the "Shore Road," the following agreement was prepared by the attorney of the respondents:

Westerly, R. I.,

Sept. 26th, 1912.

In order to help along the proposed improvement of the Shore

Road by the State of Rhode Island and the town of Westerly, in said State, the Frank W. Coy Real Estate Company, acting herein by Frank W. Coy, its President fully authorized, and Katherine R. Welch, hereby agree, to and with said State and town, that they will execute a deed to said town, and deliver the same to its agents, conveying a strip of land, needed for said improvements, where said highway goes through our land, according to the new survey, not to exceed fifty feet in width, subject to the following conditions to be inserted in said deed.

We are to have permission to maintain certain pipes across said street, which we propose to put in and lay before the proposed road is built;

Culverts and catch basins to be built in said road where necessary to take care of surface water;

Proper approaches to be made from the road to the adjoining fields, barns and buildings on said farm, where necessary;

We are not to relinquish any rights for damages that may accrue on account of the collection of, and the flowage of water on our land, from said road.

Before the execution of said deed the town is to make a stone wall along the new south line of said road west of the farm house taking the stones from the present wall and relaying them along the new south line of the proposed road where a change is made and said walls are to be relaid in as good condition as they are now in. Also build walls on each side of the proposed new road east of the bar and they shall be built as follows: The soil where the walls are to be set shall be removed to the depth of at least six inches: the walls shall be two feet thick at the bottom, and one foot thick at the top, and shall be four feet high, and shall be lined up on top and the walls shall be thorough

ly chocked throughout.

A bank wall shall be built opposite the farm house not less than four feet high, and as much higher as the town's agents shall think proper and the slope from the top of this bank wall to the edge of the macadam road bed shall be covered with loam, at least six inches deep, so grass seed may be sown thereon.

Gates or bars are to be placed in said proposed new walls in as many places as they appear in the old walls, at such places as may be designated by us.

The town is to abandon the old highway and accept the new layout, and the land in the abandoned highway to revert to us."

This agreement was signed by the respondents, was "accepted" and signed by the committee for the town and also was signed by Mr. Bristow. Mr. Bristow had no authority to bind the State and made no promises or representations to respondents. There is some evidence to the effect that Bristow told one member of the town committee that the north wall along a part of the new way would be constructed by the State Board, but this was not communicated to respondents and the signature of Bristow was added to the document with the apparent idea that some indefinable claim might be made upon the State. Work was at once begun on the new way through respondent's land, and a bituminous macadam highway was built thereon at a cost of about \$8000, which was completed in May, 1913, and opened to public travel in June. The town failed in some respects to carry out the agreement and the north wall along the highway has never been built. The respondents protested to the town for its failure to fulfill its obligation and shortly after the road was opened to travel attempted to prevent the use of the road by the public. Not succeeding in this attempt a civil action was begun and prosecuted against the town for alleged trespass. This action having been

decided adversely to the respondents, they later sued the town for breach of the contract. The decision in this case was adverse to respondents in the Superior Court and the case is now pending in this court on bill of exceptions. Having failed thus far in the suits against the town, respondents attempted to prevent travel on the road and a temporary injunction was issued on the prayer of complainant.

The trial justice in his rescript held that the immediate construction of the road was intended by respondents, as the the requirements of respondents could not be fulfilled until the road was built; that, although the State was not contractually bound by the agreement, the State Board, although it had no knowledge of the agreement, nevertheless was chargeable with knowledge of the agreement by reason of the knowledge of its engineer, Bristow, and that the dedication of the road for public use was made subject to conditions subsequent, namely, the performance by the town of the things it had agreed to do; that the argument of the State that non-performance of the conditions might warrant Coy in refusing to deliver a deed, and that he thus might retain title, but that the land had permanently become a public highway was not warranted by the facts.

We think the conclusion of the trial justice was erroneous and that the dedication made to the public was absolute and complete. In 8 R. C. L., Sec. 31, 32, the law is thus concisely stated: "A common law dedication does not operate as a grant, but by way of estoppel in pais. This doctrine is adopted from necessity, for lack of a grantee capable of taking. The dedication, therefore, is regarded not as transferring a right, but as operating to preclude the owner from resuming his right of private property, or indeed any use inconsistent with the public use. The ground of estoppel is that to reclaim the land could be a violation of good faith to the public and to those who have acquired private property with a view to the enjoyment of the use contemplated by the dedication." A

dedication is established by proof of the owner's intention to dedicate the land and the acceptance of the dedication by the public by the use of the land. As stated in *Union Co. v. Peckham*, 16 R. I. 64: "If the act of dedication be unequivocal, it may take place immediately." See also *Daniels v. Almy*, 13 R. I. 244. By such a dedication the fee does not pass to the public but only an easement. So far as the owner of the land is concerned, it is sufficient if his intention to set apart a portion of his land for the public use is clear. The intention of the owner is to be ascertained from his acts and declarations, as no particular mode of making a dedication is prescribed by the common law. His right to make a dedication subject to a condition subsequent is unquestioned. But the law does not favor conditions subsequent even when expressed in an instrument under seal, as by a deed. *Greene v. O'Connor*, 18 R. I. 56; *Mcroyd v. Coggeshall*, 21 R. I. 1; *Field v. City of Providence*, 17 R. I. 803. The State was not a party to the agreement nor was it bound to do anything required by the respondents. Whatever was to be done under the agreement was to be done by the town. After the town had built the new walls, respondents agreed to execute a deed to the town of that strip of land where the new highway was constructed through their land. The town was to abandon the old highway and the land therein was to revert to respondents. Having thus made provision to secure the fee in the old highway from the town, we think respondents intended that the public should at once acquire an easement over the new way, as in addition to their claims against the town they still retained the fee of the new location. Even if the State is chargeable with the knowledge of the engineer, although we do not pass on this point, it seems hardly probable that the State would proceed to construct this piece of highway unless it had some assurance that it would be permitted to use it after it was constructed. The State had no power to compel the town to perform its

agreement and yet, on the construction of the agreement as made by the trial justice, the public might at any time be deprived of the use of the highway by the failure of the town to perform satisfactorily any of the numerous requirements of the agreement. Such a result in our judgment never was contemplated by any of the parties. The conduct of respondents in bringing the various actions against the town would seem to confirm our conclusion that there was a valid and unconditional dedication made by respondents. Such being the case, the permanent injunction asked for by the State should have been granted.

The appeal of complainant is sustained; the decree appealed from is reversed. On July 3, 1922, the parties may present a form of decree in accordance with the opinion.

For the State: Atty. Gen. Rice.

For Respondent: Waterman & Greenlaw and J. J. Dunn.

SUPREME COURT

Mary J. Arnold
vs.
Margaret M. Barrington } Ex. &c.
No. 5558

OPINION

(Before Sumner, J., Below)

VINCENT, J. This is an action of trover and conversion brought by Mary J. Arnold, a person interested in the estate of Edmund H. Matteson, late of Warren, deceased, against Margaret M. Barrington, alleging the conversion by the defendant of a Franklin automobile.

The plaintiff is a sister of Edmund H. Matteson and the defendant was his widow. The latter has remarried and is now Margaret Matteson Barrington.

Edmund H. Matteson died May 28, 1917, leaving a will in which the Industrial Trust Company was named as ex-

ecutor and said company later accepted the trust.

Mr. Edwin A. Cady, the manager of the Warren Branch of the Industrial Trust Company, made an investigation as to the ownership of the automobile when an inventory of the estate of the deceased was being prepared and, as a result, the trust company decided that it would not be justified in claiming it as a part of the decedent's estate.

The plaintiff, proceeding in accordance with the provisions of Chapter 707 of the Public Laws of 1911, requested the executor in writing to commence an action to recover the automobile. The executor refused to do so, assigning as its reason, "that the evidence of ownership, in the possession of the executor, is not sufficient to warrant the belief that the action would be successful, or that the expense thereof would be a judicious expenditure of the funds of the estate." Thereafterwards, the plaintiff, acting under the authority conferred by the statute brought the present action. It was brought originally in the name of Mary J. Arnold but the writ was subsequently amended, on motion, so as to comply with the terms of the statute requiring the suit to be brought in the name of the estate.

The defendant sold the automobile about four months after the death of her husband.

The only question for consideration is whether the automobile belonged to the defendant or was the property of her husband at the time of his death.

The case was tried in the Superior Court before a justice thereof sitting with a jury and a verdict was rendered for the plaintiff for \$1120.

The case is now before us upon the defendant's exceptions. These exceptions raise two questions: (1). Did the trial court err in refusing to strike out the testimony of William E. Reddy, a witness called on behalf of the plaintiff; and (2), did the trial court err in denying the motion of the defendant for a new trial?

The plaintiff, in order to show that

Edmund H. Matteson and not his wife owned the car, called as a witness the deputy chief clerk of the State Board of Public Roads, who testified that the records of that board, so far as they related to the registration of automobiles for the years 1915 and 1916, had been destroyed in accordance with law. He further testified that in order to register an automobile in 1915 and 1916 the applicant had to make oath to the facts recited in the application blank and that the printed application blanks furnished by the board during those years contained the words: "I, the undersigned, the owner of the motor vehicle herein described, hereby apply to the State Board of Public Roads for the registration of said machine."

Following this, William E. Reddy, an attorney at law, was called and testified that he went to the automobile department of the State Board of Public Roads on November 15, 1917, and there found out "that a Franklin machine, 1914, Rhode Island number 6298, was registered in the name of Edmund H. Matteson of Warren, R. I., manufacturer's number was 21562, and the license expired September 1917," and that he found no change from the name of Edmund H. Matteson.

It was developed, however, on cross-examination that Mr. Reddy's only source of information was a conversation with some clerk in the office of the State Board of Public Roads. The trial court permitted this testimony to stand as part of the record, saying, "It is hearsay testimony, but it is the best they had, and I will allow it."

We think that this testimony should have been stricken out. The witness was simply repeating something which he says was told him by the clerk in the office of the State Board of Public Roads. He does not pretend that he obtained the information from any personal examination of records or otherwise than as before stated. There is substantial authority to the effect that hearsay is not admissible as secondary evidence. 22 C. J. 1070.

As the defendant argues, this testi-

mony taken in connection with that of the deputy clerk of the board would be likely to lead the jury to believe that Edmund H. Matteson had made oath that he owned the car.

The plaintiff introduced testimony to show that the automobile was paid for by the husband, Edmund H. Matteson; that it was registered in his name; that he paid the taxes upon it; that he sometimes spoke of it as his car; that he paid for repairs and other expenses; that he drove the car; that no bill of sale was given by the husband to the wife; and that the car was kept in a garage belonging to the husband. These facts are admitted by the defendant with the exception of the statement of Luella Matteson, wife of a brother of Edmund H. Matteson, that the latter always spoke of the car as his.

There is substantial testimony that Edmund H. Matteson on many occasions, and to several people, referred to the car as belonging to his wife and that it was purchased by him, in the first instance, as a present to her. If that were so no bill of sale or special act of delivery was necessary to give title to the defendant.

The testimony as to the defendant's ownership of the car is somewhat strengthened by the undisputed fact that a "rambler" car belonging to the defendant was turned in in part payment for the new car, the husband paying the balance in cash.

It is by no means uncommon for a husband in speaking of a house, an automobile, and many other things, to call them: his, although the legal title may be in his wife. The expenditures of the husband for repairs and taxes, his driving the car and keeping it in his garage, do not impress us as being anything more than what a husband, living in

amicable relations with his wife, would naturally do. Such acts are not in our opinion conclusive in determining the matter of ownership in the present case.

The trial justice in his rescript, denying the defendant's motion for a new trial cites from 20 Cyc. 1195, as follows: "A mere promise or declaration of an intention to give, however clear and positive, is not enough to constitute a valid gift *inter vivos*. The intention must be consummated and carried into effect by those acts which the law requires to divest the donor and invest the donee with the right of property. Complete and unconditional delivery is essential to the perfecting of such a gift, for where the donor retains dominion over the property or where a locus penitentie remains to him there can be no legal and perfect donation."

There can be no question that the law relating to gifts *inter vivos* is correctly stated. The error of the trial court is in its application to the case at bar. The trial justice seems to have proceeded upon the theory that Edmund H. Matteson originally owned the car and therefore, there being no sufficient evidence of a subsequent transfer or delivery to the defendant, it remained a part of his estate. There is testimony tending to show that Mr. Matteson never owned the car and that he paid for it not for himself but as a present for his wife. If the title was in her from the beginning, any transfer or act constituting a special delivery to her would have been superfluous.

We think that justice requires that the case should be submitted to another jury under proper instructions in accordance with this opinion.

The exceptions of the defendant are sustained. The case is remitted to the Superior Court with direction to give the defendant a new trial.

For Plaintiff: W. H. McSoley.

For Defendant: James Harris and J. C. Knowles.

SUPREME COURT

Vincenzo Stea, et al.

vs.

Roger Laudati

Ex. &c. No. 5463

OPINION

(Before Blodgett, J., Below)

STEARNS, J. The action is trespass on the case for libel. The plea is the general issue. After a jury trial, which resulted in a verdict for the defendant, Stea, the case is now in this court on plaintiff's bill of exceptions.

The defendant, Stea, was the presiding officer of one of the subordinate lodges of the Order of the Sons of Italy, a large fraternal organization of men of Italian descent.

The plaintiff is a young man of good reputation, who is engaged in the real estate business in the Silver Lake district of Providence. Plaintiff was a member of the organization in 1917, but, at the time of the publication of the libel, in March, 1918, he was no longer connected with the society. Plaintiff's uncle, Nicola Laudati, was an officer of the society and also the president of a committee of the Order which had control of the "Death Benefit" fund. Upon the death of one of the members of the Order a controversy arose as to whether the lodge, which had been paying the dues of the deceased, or the widow of deceased, was entitled to receive the amount of the death benefit. Nicola Laudati claimed the fund for the lodge. Antonio Sollito, an officer of one of the lodges, supported the claims of the widow. There is evidence that defendant and certain other members of the society prepared and had printed, in the Italian language, fifteen hundred circulars, which later were widely circulated throughout the State among the Italians. The language of the circular was violent and abusive. After announcing the fact that Sollito had been suspended by the organization because of his support of the claim of the widow, the charge was made in the circular that Sollito

had thus been made the first victim by the grafters of the organization; that it was now known to all the members the efforts made by Sollito and others "against the company of secret advisers of Silver Lake, led by R. Laudati and his sponsors, who wrongfully appropriated \$400, fleeced from all the brothers of Rhode Island and stolen from a poor widow;" reference was also made to this bad administration by Laudati and his companions and to a demand which had been made for the restitution of the money wrongfully appropriated. The printed circular purported to be signed by the defendant, Stea, and others. Stea denies that he signed the draft for the printed circular and also makes a general denial of any responsibility for the publication of the printed circulars. The evidence on these issues is conflicting and raised issues of fact for the jury. The originators of the circular secured the services of an Italian scholar to revise and embellish their work. He testifies that the printed circular was prepared by him according to instructions and the draft given to him. It seems probable that the name "P. Laudati" by some mischance was printed instead of that of "N. Laudati," as defendant did not know the plaintiff, R. Laudati. The printed circulars were delivered by the printer to Sollito. From him defendant secured at least one of these copies, which he carried to Bristol, and there gave to a member of the organization, to whom he stated that the circular contained a statement of what had been going on in Providence. Plaintiff is the only "R. Laudati" who lives in the Silver Lake district, and, in fact, in the entire State.

Numerous objections taken by plaintiff during the trial are waived and the only exceptions now urged are those taken to the charge of the jury, to the failure to charge as requested, and to the refusal of the trial justice to grant a new trial.

The trial justice left it to the jury to decide whether the circular was libelous and instructed by them that the meaning of the word "steal" in the cir-

cular was to be determined by a consideration of the whole document, from which it was for the jury to say whether or not it was a malicious attempt to charge a crime or whether it was simply the use of exuberant language to express a very volcanic state of feeling. This instruction was erroneous, and plaintiff's exception thereto is sustained. An accusation is libelous per se which falsely charges an offense which, although not a crime at common law, if proved may subject the party accused to a punishment not ignominious but bringing disgrace; *Kelley v. Flaherty*, 16 R. I. 234 (a charge of fornication); *Morrissey v. Providence Telegram Co.* 19 R. I. 124 (a charge that a man is an "ex-convict"); *Blake v. Smith*, 19 R. I. 476 (a charge of the keeping of a house of ill-fame). The charge in the circular is, the commission of the crime of larceny or embezzlement. This is libelous per se and consequently there was no occasion to allege or prove special damages. Upon proof of defendant's responsibility for the libel plaintiff is entitled to recover compensatory damages. *State v. Spear*, 13 R. I. 324; *O'Brien v. Times Publishing Co.*, 21 R. I. 256. The award of exemplary or punitive damages in libel and slander is discretionary with the jury in cases where they are allowable. *Kenyon v. Cameron*, 17 R. I. 122. They are properly allowed when actual malice is shown. *Tillinghast v. MacLeod*, 17 R. I. 208, or a recklessness equivalent to actual malice, *Folwell v. Providence Journal Co.*, 19 R. I. 551.

The court further charged that to entitle plaintiff to recover he must prove that at the time this circular was drawn up, it was the intent of the maker of it to libel R. Laudati and that if the name,

"R. Laudati," was used instead of "N. Laudati" as a result of negligence plaintiff could not recover; that if defendant caused the publication of the circular and intended to libel R. Laudati the verdict should be for plaintiff, but if the circular was not aimed at R. Laudati and if from the whole of the circular it appears it could not have been a libel against R. Laudati because he was not a member of the organization and was not interested in the internal dissensions of the society and that if the whole context of the circular is such that it shows that it was aimed at that person who was an officer and who was interested in the death benefit, that it was aimed at him, then the verdict must be for the defendant. This part of the charge was erroneous. The question as stated in one of the cases is not who was aimed at, but who was hit. By his own admission defendant was responsible for the publication of the libel even if, as he claimed, he gave but one copy of the circular to the member of the organization in Bristol. *Rice v. Cottrell*, 5 R. I. 340. If a mistake was made in the printing of the name, it could easily have been discovered by defendant by reading the circular. A grave charge designedly intended to injure the reputation of the person named in the circular was made. The circular referred by name to one person only. No one else could have a cause of action for this libel. There was no need to refer to extrinsic evidence to determine to whom the writing was intended to apply. The meaning of the circular as conveyed by the words is clear. The fact that active members of the organization understood that a mistake had been made in the name used is no defence. The public had no means of ascertaining who was referred to except by what was stated in the circular. The defendant in libel, as in other torts, is bound by the natural and ordinary consequences of his acts. The intent of defendant is no defence to the action, but is properly to be considered only in the assessment of damages. *Folwell v. Providence Journal Co.*, *supra*.

Taylor v. Hearst, 107 Cal. 262; Corrigan v. Bobbs-Merrill Co., 228 N. Y. 58. In the circumstances proof of express malice was unnecessary. The element of legal malice is found in the negligence and recklessness of defendant's acts. Folwell v. Providence Journal Co., supra.

As the plaintiff is to have a new trial it is unnecessary to consider the other exceptions.

Plaintiff's exceptions to the charge of the court, which we have considered are sustained, and the case is remitted to the Superior Court for a new trial.

For Plaintiff: George F. Troy.

For Defendant: Brand & Veneziaie.

SUPREME COURT

Anton Langhammer
vs.
Achille P. Cote et ux. } Ex. &c.
No. 5604

RESCRIPT

(Before Blodgett, J., Below)

The plaintiffs are partners in business as real estate brokers. This is an action of the case in assumpsit brought to recover a commission, to which plaintiffs allege they are entitled, upon the sale of certain real estate belonging to the defendants in Woonsocket, which sale the plaintiffs allege was brought about through their agency.

The case was tried in the Superior Court before Mr. Justice Blodgett, sitting with a jury, and resulted in a verdict for the plaintiffs. The defendants duly filed their motion for new trial which was denied by said justice. The case is before us upon the defendants' exception to the decision of said justice upon the motion for new trial, and upon exceptions taken by the defendants to rulings of said justice made in the course of the trial.

The evidence presents a state of facts similar to those before the court in Gross v. Tillinghast, 35 R. I. 298. The

defendants have pointed out some non-essential differences between the facts of the two cases, but in this case, as in the former, there was evidence proper to be submitted to the jury which would warrant a finding that the plaintiff produced for the defendant a purchaser able and willing to purchase said property on terms satisfactory to the seller.

There was testimony from which the jury might properly find that the defendants placed the property in question in the hands of the plaintiffs as brokers for the purpose of obtaining a customer for the sale of the same; that the plaintiffs advertised the property in a public newspaper in Woonsocket as for sale by them; that in response to such advertisement on Friday, December 17, 1921, one Albert J. Daignault, who afterwards purchased the property, communicated with one of plaintiffs, who gave to him information as to the property and the price at which it could be purchased and said plaintiff then sought to take Mr. Daignault immediately to inspect the property; that Mr. Daignault because of the pressure of his private business was unable to make the visit at that time, but promised to go alone and see the property and report to plaintiff. On Saturday, December 18, 1920, both the plaintiffs met and gave him further information in regard to the property. They then informed him that they had another prospective purchaser for it. Mr. Daignault promised them that on Sunday, the next day, he would inspect the property accompanied by his wife. On Sunday, Mr. Daignault and his wife visited the property and there met the defendants and opened negotiations directly with them for the purchase of the property. The sale was consummated between Mr. Daignault and the defendants, and the deed of the property was passed on Tuesday, December 21, 1920.

The purchaser testified that four months before this transaction he was informed by a friend, not a broker or one interested in the sale, that the defendants desired to sell their property. The purchaser, however, did nothing.

ing until his attention had been called to the property anew by the plaintiffs and they had aroused his interest and induced him to take action which led to the sale. The defendants have argued that because of the previous knowledge of the purchaser that the defendants desired to sell, this case is to be distinguished from *Gross v. Tillinghast*, supra. The defendants overlook that it appears in the course of the opinion in that case that a broker other than the plaintiff, *Gross*, had previously shown the house in question to the purchaser and that the other broker had endeavored to sell the house to the purchaser.

The defendants lay stress upon the fact that in *Gross v. Tillinghast*, the plaintiff had personally shown the house to the purchaser. That is an immaterial difference. In this case it could be found that the plaintiffs had urged and did induce the purchaser to visit the house.

From a fair consideration of the testimony the jury were amply justified in finding that the plaintiff produced a purchaser for the defendants' property who was able and willing and did purchase the property on terms satisfactory to the defendants.

There is no merit in the exception of the defendants to the charge of the justice or the refusal of the justice to charge as requested by the defendants. His charge embodies the law of this State applicable to the facts; and the requests, in so far as they correctly state the law, add nothing to the general instruction already received by the jury.

All of the defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment upon the verdict.

For Plaintiff: E. L. Jalbert.

For Defendant: James H. Rickard.

SUPREME COURT

Behrend T. Fischer, et al	} Ex. &c. No. 5641	E
vs.		
Charlotte F. Scott		
Mary E. Van Ausdall	}	
Et Al.		
For an Opinion		

OPINION.

(Before Tanner, P. J., Below)

RATHBUN, J. The first case is before us on exception to the decision of a justice of the Superior Court affirming a decree of the Municipal Court of the City of Providence.

Said decree allowed and set off in fee to Charlotte F. Scott, widow of Earl W. Scott, an undivided one-half interest in certain real estate in which her husband in his lifetime had a vested interest in one-half thereof in remainder.

The appellants appealed from said decree to the Superior Court. The parties waived a jury trial and agreed that the facts are as follows: "That said Earl W. Scott died on February 21, 1920, intestate and without issue, leaving the petitioner, his wife, surviving, and that said Earl W. Scott was entitled to a vested remainder in fee simple in an undivided one-half interest in said real estate, said remainder being expectant upon the life estate of Mary C. Toye, and that said Mary C. Toye died prior to the filing of said petition, and that none of said real estate is required for the payment of debts of said Earl W. Scott, and that said Earl W. Scott owned at the time of his death real and personal property of the value of less than Two Hundred Dollars (\$200.00) except his said interest in said real estate, and that said Charlotte F. Scott owns property of the value of less than Five Hundred Dollars (\$500.00) and is obliged to support herself by her own labor, and that the entire value of said undivided one-half interest in said real estate does not at the present time exceed Five Thousand Dollars (\$5000.00)."

The appellee's husband, Earl W. Scott, was never seized of said real estate as

he deceased before Mary C. Toye, the life tenant. The question arises whether a vested interest in remainder expectant upon a life estate is "real estate" within the meaning of Public Laws 1919, Chapter 1787, Section 7, the statute by authority of which said decree was entered, which provides that: "Whenever the intestate dies without issue and leaves a husband or wife surviving, the real estate of the intestate shall descend and pass to the husband or wife for his or her natural life. The probate court having jurisdiction of the estate of the intestate, if a resident of this state, or the probate court of any city or town in which the real estate of the intestate is situated, if not a resident of this state, may also, in its discretion if there be no issue as aforesaid, upon petition filed within one year after the decease, allow and set off to the widow or husband in fee real estate of the decedent situated in this state to an amount not exceeding five thousand dollars in value."

The same questions are raised in the second case, the parties having concurred in stating such questions in the form of a special case for the opinion of this court, in accordance with the provisions of G. L. 1909, Chap. 289, Sec. 20.

Section 9, Chapter 32, G. L. 1909, provides: "The word 'land' or 'lands,' and the words 'real estate,' may be construed to include lands, tenements and hereditaments, and rights thereto and interests therein." A vested remainder in fee is an interest in real estate. Section 1 of said chapter provides: "In the construction of statutes the provisions of this chapter shall be observed, unless the observance of them would lead to a construction inconsistent with the manifest intent of the general assembly, or be re-

pugnant to some other part of the same statute." A construction constraining the words "real estate" in Section 7 of said Chapter 1787, to include a vested interest in remainder, would not, in our opinion, be "a construction inconsistent with the manifest intent of the general assembly, or be repugnant to some other part of the same statute."

At the hearing before us it was contended on behalf of the appellant that inasmuch as neither dower nor curtesy attached to an estate unless the deceased spouse was seized thereof during the intermarriage it was not the intention of the legislature as expressed in said Section 7 to give to the surviving spouse an interest in a vested estate in remainder. The clear intention of said Section 7 was, in the event of the decease of one spouse intestate and without issue to give to the surviving spouse a larger interest in the estate of the intestate than was given by the statutes providing for dower and curtesy and by G. L. 1909, Chap. 316 of which said Section 7 is an amendment. Said chapter gives to the surviving spouse a larger interest also in the personal estate. Said chapter even permits the probate court in its discretion to allow and set off in fee to the surviving spouse ancestral estate of the deceased spouse to an amount not exceeding five thousand dollars in value. What is a vested interest in remainder if it is not real estate? It is certainly not personalty. It is an interest which may be disposed of by will. Sec. 23, Chap. 252, G. L. 1909, Secs. 1 and 2, Chap. 254, G. L. 1909; *Loring v. Arnold*, 15 R. I. 428.

We do not think the words "real estate of the decedent" can fairly be construed to mean "real estate of which the deceased was seized in possession during

the intermarriage." We are of the opinion that the legislature in passing said Chapter 1787 intended to give to the surviving spouse, when the decedent died without issue, an interest in all of the real estate of whatsoever nature of the deceased spouse; that said real estate in remainder on the decease of said Earl W. Scott passed by virtue of said Section 7 to his widow, Charlotte F. Scott, for life and that said Municipal Court had authority by virtue of Section 7 of said Chapter 1787 to allow and set off to her in fee said remainder as it did not exceed five thousand dollars in value, and the parties to the proceedings seeking an opinion are advised accordingly.

The exception of the appellants in the first case is overruled and the case is remitted to the Superior Court for further proceedings.

For Plaintiff: Quinn & Kernan.

For Defendants: Edwards & Angell.

SUPREME COURT

Fannie Seltzer }
vs. } Ex. &c. No. 5561
Joseph Greene }

Joseph Greene }
vs. } Ex. &c. No. 5562
Fannie Seltzer }

RESCRIPT.

(Before Sumner J., Below)

The declaration in each of these actions alleges a breach of the same contract for the purchase and sale of real estate. The cases were tried together in the Superior Court. Seltzer obtained a verdict for five hundred dollars in the first case and a verdict for costs in the second.

Each case is before this court on exceptions taken by Greene.

On August 23, 1920, the parties entered into a written contract whereby Greene agreed to purchase and Seltzer

agreed to sell certain real estate for \$21,400. The agreement provided that the sum of the principal and accrued interest on two mortgages outstanding on said real estate would be deducted from the purchase price and that the transaction would be completed on or before October 1, 1920. At the time of the signing of the agreement Greene paid to Seltzer \$100 as a deposit to be applied to the purchase price. It appears that, unknown to either of the parties, a third mortgage on said real estate, although paid, was still outstanding on the record. On the evening of September 30, 1920, Seltzer accompanied by her husband and a Mr. Shaw, a real estate agent, called at Greene's home and handed to him a deed executed to convey said real estate to Greene. There is a sharp conflict in the testimony as to what Greene at that time said. He testified that he told her that he did not have in his pocket the balance of the purchase price and that he would not accept the deed until said third mortgage was discharged but that he would accept it when said mortgage was discharged on the record; that Mrs. Seltzer said she had no knowledge as to the third mortgage. Mrs. Seltzer, her husband and Mrs. Shaw, each testified that the deed was exhibited to Mr. Greene for his inspection; that he was not asked to accept the deed at that time; that Greene did not mention the third mortgage but stated that he did not like the neighborhood and would not fulfill his agreement to purchase the property. Soon after this interview said third mortgage was discharged. On October 5, 1920, Mrs. Seltzer's attorney, Mr. Semonoff, who drafted said agreement for the parties, wrote to Mr. Greene as follows: "I beg to notify you on behalf of Mrs. Fannie Seltzer that the best price she could get for her real estate on Taylor street which you contracted to buy from her, is \$10,500, and that she has agreed to sell the premises for that price on Thursday, October 7, 1920. If you still desire to take the premises or can secure a larger sum therefor please get in touch with

me before noon on Thursday next." Greene did not communicate with either Mrs. Seltzer or her attorney. Greene testified as follows: "Q. Didn't you intend to answer the letter that you got from the lawyer, dated October the 5th? A. No, I did not. Q. Didn't intend to answer it? A. No. Q. Didn't he tell you in that letter to get in touch with him if you wanted the property? A. Well, I didn't want the property any more when I see the way things was going on."

Mrs. Seltzer sold said real estate to a third person for \$10,500, and brought suit to recover the difference between said amount and \$11,400, the amount which Greene agreed to pay. Greene brought suit to recover \$25, the expense which he incurred in having title of said real estate examined; also the sum of \$100, the amount which he paid as a deposit.

Greene presents three exceptions in each case, as follows: To the admission of testimony, to the refusal of the trial court to direct a verdict in his favor, and to the refusal of said court to grant him a new trial. We think there was ample testimony to warrant the jury in finding that Greene rather than Mrs. Seltzer broke the contract and that Greene's conduct excused Mrs. Seltzer from tendering to him the executed deed before selling to a third person and bringing suit. See 38 Cyc. 144, 145. We find no reason for disturbing the verdicts, which have the approval of the trial court.

All of Greene's exceptions are overruled and each case is remitted to the Superior Court with direction to enter judgment on the verdict.

Fore Greene: Robinson & Robinson.

For Seltzer: Judah Semenoff.

SUPREME COURT

Francis E. Sullivan }
vs. } Ex. &c. No. 5554
Hope Publishing Co. }

RESCRIPT.

(Before Sumner, J., Below)

This is an action for libel. It was tried in the Superior Court before a jus-

tice thereof sitting with a jury and a verdict was rendered for the defendant.

The plaintiff filed a motion for a new trial which was heard and granted. The case is now before us on the exception of the defendant to the decision of the trial justice granting said motion.

The trial court says in its rescript: "The court feels that the verdict does not give substantial justice to the plaintiff and that the jury 'perversely' found a verdict for the defendant in spite of the instructions of the Court, and accordingly grants the motion of the plaintiff for a new trial."

If the trial judge believed that the verdict failed to do substantial justice between the parties it was his duty to grant a new trial in accordance with our decision in McMahon vs. R. I. Company, 32 R. I. 237,, in which this court, quoting from the opinion in Dewey vs. Chicago, Etc. Ry. Co., 31 Iowa 373, said: "Those courts (trial courts) ought to independently exercise their power to grant new trials, and, with entire freedom from the rule which controls appellate tribunals, they ought to grant new trials whenever their superior and more comprehensive judgment teaches them that the verdict of the jury fails to administer substantial justice to the parties in the case. Whenever it appears that the jury have, from any cause, failed to respond truly to the real merits of the controversy, they have failed to do their duty, and the verdict ought to be set aside and a new trial granted."

The decision in the McMahon case has been affirmed in several other opinions of this court

We cannot say that the trial justice was wrong in setting aside the verdict upon the ground that it failed to do substantial justice between the parties.

The defendant's exception is overruled and the case is remitted to the Superior Court for a new trial.

For Plaintiff: John P. Beagan and Henry M. Boss.

For Defendant: Fitzgerald & Higgins.

SUPREME COURT

Apostolos B. Cascambas vs. Frank H. Swan, et al. Receivers of R. I. Co.	}	Ex. &c. No. 5593
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OPINION.

(Before Barrows, J., Below)

RATHBUN, J. This is a nation of tresspass on the case for negligence. The trial in the Superior Court resulted in a verdict for the plaintiff for \$874.20. The defendant made a motion for a new trial. The trial court refused to disturb the findings of the jury on the question of liability, but found that the amount of damages awarded was not supported by the evidence and granted a new trial unless the plaintiff should remit \$50 of the damages awarded. The plaintiff filed a remittitur for \$50.

The case is before this court on the defendant's exceptions, as follows: To the refusal to grant a new trial without condition; to the refusal to direct a verdict for the defendant, and to a certain instruction to the jury

The plaintiff is seeking to recover for damages caused to his Ford truck and to merchandise, with which the truck was loaded, by a collision between said truck and a street car operated by the defendants. The accident occurred on Quidnick street in the town of West Warwick. Quidnick street at the place is located on the westerly side of the southerly course. The street car track of collision runs in a northerly and street. The street car at the time of the accident was proceeding in a northerly direction and the truck in a southerly direction. It is clear that the chauffeur in charge of the truck was, a short time before the accident, proceeding with the right hand wheels of the truck running in a gulley located between and parallel to the rails of the car track. The plaintiff contends that his chauffeur just before the collision was compelled to turn the truck partially upon the car

track to avoid hitting an automobile which was proceeding in the opposite direction; that it was very difficult for the chauffeur to extricate the right hand wheels of the truck from said gulley; that the collision occurred either before he succeeded in driving off the car track or before the truck was away from the track a sufficient distance to avoid the overhang of the car, and that by the exercise of due care after seeing the chauffeur's plight the motorman could have avoided the accident.

The defendants contend that the plaintiff's chauffeur suddenly, and without warning, drove upon the track and that the motorman was unable to stop the car before it collided with the truck

The testimony was conflicting on the question whether the plaintiff's chauffeur suddenly turned in front of the electric car when the car was so near that it was impossible for the motorman to stop the car in time to avoid the accident or whether the plaintiff was driving with the right hand wheels in the gulley and vainly endeavoring to drive out of the gulley and off the car track when the electric car was a sufficient distance away to enable the motorman after he should have observed the chauffeur's predicament to avoid the accident by stopping the car.

We think that the evidence warrants a finding that the chauffeur was plainly endeavoring to drive out of the gulley when the car was a sufficient distance away to enable the motorman had he been in the exercise of due care to avoid the accident. The testimony being conflicting it was a question for the jury whether the motorman had the last clear chance to avoid the accident.

The exception to the refusal to direct a verdict for the defendant is overruled.

The defendant's counsel excepts as follows to the charge to the jury. "I take exception to that part of the Court's charge stating that the doctrine of the last clear chance applies where the defendant, after seeing the predicament of the plaintiff, could have by the exercise of reasonable care stopped the car, the

doctrine of the last clear chance applying also to the plaintiff and the Court having failed to charge that the plaintiff could have stopped in time to avoid the collision by the exercise of due care."

The trial justice charged the jury relative to the rule of the last clear chance, as follows: "But on this phase of the case if you find that the plaintiff himself was not negligent, or even if you find that he was negligent and that the motorman by the exercise of reasonable diligence after he observed the dangerous position of this man Matthews could have stopped his car and avoided the collision, then you would be justified in holding the company liable."

We understand from the argument of defendants' counsel that he contends that the language of the court quoted should have been supplemented by a statement to the effect that if the negligence of the plaintiff's chauffeur continued until the time of the accident the plaintiff can not recover. There was no error in the charge as given.

In *Underwood vs. Old Colony St. Ry. Co.*, 33 R. I., at 325, this court said: "If the defendant means by this exception, that in case the deceased was guilty of negligence in driving upon its track and while on the track was still careless in failing to look towards the approaching car, although the motorman saw him in his place of danger and saw that the deceased was ignorant of that danger and was taking no steps on his part to avoid it, and the motorman also knew unless some measures were taken to check the speed of the car the deceased would be injured, yet it was not the motorman's duty to check the speed of the car because the deceased was still careless, we say that such is not the law of this state." * * * "It would be the motorman's duty to take such measures as he reasonably could to check the speed of the car and to avert the accident. If he failed in that duty, such failure would become the proximate and efficient cause of the injury and the defendant would be liable."

The court had previously instructed

the jury as follows: "He had a right to assume that if a man is running along on the track he will turn off under ordinary circumstances and it would only be in the event that the motorman discovered that this driver had caught his wheel in the gully and was trying to get out and the motorman made that discovery in time so he could have stopped his car and avoided the collision, that there would have been any duty on his part to stop his car and keep from hitting the automobile."

The defendant has no valid reason for complaining of the charge relative to the last clear chance.

On the question of liability the verdict has the approval of the trial court and we find no reason for disturbing the verdict as reduced by the remittitur.

All of the defendants' exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict as reduced by the remittitur.

For Plaintiff: Sheffield & Harvey.

For Defendants: Whipple & Sweeney.

SUPREME COURT

John E. McMurty, et al. } Ex. &c.
vs. }
River Spinning Company } No. 5569.

RESCRIPT.

(Before Barrows, J., Below)

This is an action of assumpsit for breach of contract to properly perform certain work. In the Superior Court a trial by jury was waived and the justice who heard the cause rendered a decision for the defendant. Thereafter the plaintiffs made a motion for a new trial. Said motion was denied and the case is before this court on the plaintiff's exception to said decision and on their exception to the denial of said motion.

The declaration alleges that the plaintiffs sent certain noils to the defendant

to be carbonized; that the defendant promised and guaranteed to carbonize said noils "in a proper and workmanlike manner"; that the defendant did not perform the work "in a proper and workmanlike manner" but rendered the noils unmerchantable by improper work and did not return them to the plaintiffs. The defendant pleaded the general issue.

The plaintiffs refused to accept the noils or pay for the labor upon them and they are held by the defendant. The main issue in the case was whether the noils were carbonized "in a proper and workmanlike manner." Carbonization is a process for rendering burs and other hard substances in the wool brittle and crumbly so that they may be readily removed by willowing and carding.

The testimony was conflicting as to whether the work was done "in a proper and workmanlike manner." There was testimony that noils containing a large amount of burs, especially spiral burs, could not be treated so as to remove all traces of burs without seriously damaging the wool. There was considerable testimony that the noils contained a large amount of spiral and other burs and that considering the amount of burs in the noils good results were obtained. Witness Johnson, called by the plaintiffs, in answer to a question from the court, testified: "As I said, if it was a burry noil it is properly carbonized; if it was not, it isn't." The testimony was conflicting as to the amount of burs in the noils. Said justice in his rescript said: "All the witnesses agreed that in order to determine whether a good job had been done, one should see the noils in the grease, and all except the plaintiff and Davis testified that if the noils in question were very burry, the job was a good carbonizing job. There can be no doubt on the testimony that 85 of the bags which came to defendant contained a considerable number of spiral burs and that the other 14 bags which plaintiff asked to have blended with the 85 were more burry than the large lot. Mr. McMurty's testimony that all the noils were not a very burry lot is of small value com-

pared to the testimony of Bonin and Beillergon; the former saw only a sample, the latter examined about half of the bags themselves. The only witness who saw the noils before processing said they were very burry, particularly the small lot."

This court has frequently held when the testimony was conflicting in a case tried by a justice of the Superior Court sitting without a jury that the determination of said justice as to what the facts are should not be set aside unless such determination clearly fails to do justice between the parties. Said justice found that the work was done in a proper and workmanlike manner. After a careful consideration of the transcript and the other portions of the record we are unable to say that his determination clearly fails to do justice.

The plaintiffs' exceptions are overruled and the case is remitted to the Superior Court with directions to enter judgment on the decision.

For Plaintiff: Gardner, Moss & Haslam.

For Defendant: Edwards & Angell and J. C. Knowles.

SUPERIOR COURT

Alsace Worsted Mills	} No. 50237
vs.	
Adams Express Co.	
RESCRIPT	

June 20, 1922

BARROWS, J. Heard on demurrer to a plea in abatement.

An action of assumpsit was commenced by plaintiff against defendant, an unincorporated association, existing under the laws of the State of New York, by writ, dated April 22, 1921. The writ was served on April 25th upon one H. Fred Prew as resident citizen alleged to have authority to accept ser-

vice of process for defendant.

The declaration charges the loss of goods entrusted to defendant on May 3, 1918, for carriage from Woonsocket to Philadelphia.

Defendant, appearing specially for the sole purpose of objecting to the jurisdiction, pleaded in abatement that it had not transacted any business in Rhode Island since June 30, 1918; that although Mr. Prew was its agent at the time of the shipment in question, and until September 4, 1919, on that date, his authority to accept service was revoked.

To this plea plaintiff demurred, averring that the attempted revocation of Prew's authority to accept service was a nullity as to plaintiff unless another agent was appointed.

The solution of the question raised involves a construction of Chapter 189, General Laws, 1909. We cannot accept defendant's contention that Section 1 of that chapter is not broad enough to require defendant, as an unincorporated association, to appoint an agent for service. We believe the section was intended and that its language is broad enough to include unincorporated associations recognized by the laws of another State. To accept the contention of the defendant would have a company like Adams Express Company free to do business in Rhode Island out of reach of Rhode Island process. Perhaps it is not probative, but it is suggestive that such a contention was not acted upon by failing to have an agent while defendant was actually engaged in the express business in Rhode Island.

Neither can we accept defendant's contention that the statute is only intended to cover intra-state shipments. Transport "within this State" may mean either transportation begun and ended in Rhode Island or having its inception here. While it is apparent that the statute could not apply to an express company merely en route with goods through the State, it seems to us equally clear that if one comes into the State, establishes an office to do business, and here procures goods for carriage, the

statute applies whether the contemplated carriage be all within or only partly within the State. Such a view of our statute does not conflict with the commerce clause of the Federal Constitution.

International Harvester Co. vs. Kentucky, 234 U. S. 579.

Reynolds vs. M. K. & T. R. R. Co., 224 Mass. 379, affirmed 255 U. S. 565.

The question remains as to the validity of the revocation of Mr. Prew's authority to accept service. A general right to revoke Prew's power after the company ceased to do business seems beyond question. Whether the revocation could be effective to prevent the pursuit in Rhode Island of rights acquired while the company was doing business here depends on the construction of the statute. It seems to us the purpose of the statute was to provide our citizens with a legal forum for the trial of controversies with foreign express companies when those controversies arose out of Rhode Island transactions during the time the companies were doing business here. It was not intended to place in the power of the express company the right to withdraw from business and by so doing at once shut off the right to sue in Rhode Island for past breaches of legal duty to citizens in Rhode Island. We believe the statute intended to continue the requirement for an agent after the company's withdrawal, so long as liabilities existed on business done here. It is evident that some limit must be implied. Instead of reading into the statute, as urged by the defendant, the words "while doing business," we prefer the construction, which reads in "while liabilities exist for business done in Rhode Island."

One case suggested the analogy of irrevocability of a power coupled with an interest and that the agent in cases of this type has an irrevocable interest in favor of that portion of the public which acquired rights during the admitted existence of the power.

Mutual Reserve Fund Life Ass'n. vs. Boyer, 50 L. R. A. 539, 1900 Kan.

Supporting the view which we have taken, see

Meixell vs. Amer. Motor Car Sales Co., 181 Ind. 153 (1913).

Brown-Kerchum Iron Works vs. Swift, 53 Ind. App. 630 (1913).

We construe our statute to mean that an agent for service remains such until another agent be appointed, so far as relates to those claiming legal rights arising from business done by the express company in Rhode Island.

The revocation of the power of Mr. Prew to accept service, we find invalid so far as this plaintiff's cause of action is concerned.

The demurrer to the plea in abatement is sustained.

For Plaintiff: J. H. Rickard.

For Defendant: Green, Hinckley & Allen.

SUPERIOR COURT

Alice B. Bowden }
vs. } Eq. No.
William T. Ide. }

RESCRIPT.

TANNER, P. J. This is a bill for partition of real estate.

The principal question in dispute in the matter is the validity of previous partition of the estate through the award of arbitrators. The arbitrators awarded the homestead estate to the respondent with a proviso that he should deed the property to his son. The respondent refuses to deed said property to his son, but claims that said award to him is valid nevertheless. Said respondent claims that said proviso in said award is void and may be rejected without affecting the remainder of the award.

Two of the arbitrators testify that they made the award upon the agreement of said Respondent Ide to carry out said proviso. This is denied by the Respondent Ide, but upon the testimony we find this issue against the Respondent Ide.

While it is true that parts of an

award may be in some cases rejected without affecting the remainder of the award, we do not think this can be done in the present case. It is quite apparent that the arbitrators would not have awarded the homestead estate to the Respondent Ide but for their belief that he would carry out the proviso of the award. It is therefore impossible to say that proviso.

We must therefore hold that the award the award of the homestead estate to the Respondent Ide was not effected by the is void, especially in view of the respondent's refusal to carry out the proviso.

For Plaintiff: Greenough, Easton & Cross.

For Defendant: John P. Beagan.

SUPERIOR COURT

Hilda Sankey }
vs. } W. C. A.
Pawtucket } et. No. 254
Amusement Co. }

RESCRIPT.

TANNER, P. J. The petitioner seeks to have the payments on account of the death of her father continued to herself since the death of her mother.

The petitioner is 17½ years old.

The only question raised is whether or not she is entitled to the full payment for the remainder of the term, or whether she is limited to payments until she reaches the age of 18.

We see nothing in the statute which limits the payments to her attainment of the age of 18. Newton vs. R. I. Co., 42 R. I. 58.

We think the petitioner is entitled to a decree for payment to her of the compensation for the remainder of the statutory period.

For Petitioner: P. E. Dillon.

For Respondent: Greene, Hinckley & Allen.



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No. 40

JULY 7, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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SUPREME COURT

Frances Lucey, p. a.	}	Ex. &c. No. 5598
vs. John F. Allen		
John J. Prendergast	}	Ex. &c. No. 5599
vs. John F. Allen		
Helen M. Prendergast	}	Ex. &c. No. 5600
vs. John F. Allen		

OPINION

(Before Sumner, J., Below)

SWEETLAND, C. J. Each of the above entitled cases is an action of trespass on the case to recover damages for personal injury and in the case of plaintiff, Helen M. Prendergast also for injuries to an automobile. All of said injuries it is alleged were received in a collision between an automobile operated by the plaintiff, John J. Prendergast, and one operated by the defendant, Allen, which collision it is alleged was caused by the negligence of the defendant, Allen. The automobile operated by John J. Prendergast was owned by the plaintiff, Helen M., wife of said John J.

These three cases were tried together before a justice of the Superior Court sitting with a jury and at the same time there was tried before said justice and jury the action of trespass on the case of Allen against John J. Prendergast to recover damages for injury to the automobile of Allen arising from said collision, which Allen alleges was brought about by the negligence of Prendergast. The trial resulted in a verdict for the defendant in each of said four cases. Each of the four plaintiffs duly filed a motion for new trial, all of which motions were denied by said justice. The plaintiff, Allen, has not sought to bring his action to this court for review. Each of the other three cases are before us upon the plaintiff's exception to the action of said justice denying the motion

for new trial and upon exception to the rulings of said justice made in the course of the trial.

* The collision in question occurred at or near the intersection of River and Division streets in Pawtucket. Just before the collision the defendant, Allen, was proceeding westerly on Division street and approaching River street, and John J. Prendergast, with whom was riding the plaintiffs, Frances Lucey and Helen M. Prendergast, was proceeding southerly on River street, intending to turn easterly into Division street. On the northeast corner of Division and River streets there is a building situated on the lot line on each street creating what has been called a "blind corner." The testimony of Allen is that as he approached River street he sounded his horn and that just before he reached River street Prendergast came out of River street, cut diagonally across said "blind corner" and struck Allen's machine on its left front corner, while Allen was on his right side of Division street and before Allen had reached the easterly line of River street. The testimony of Prendergast is that as he approached Division street he sounded his horn and proceeded along the extreme right side of River street until he reached the northwest corner of River and Division streets; that he then, with a broad turn to the left, proceeded easterly to his right side of Division street; that after he had reached the centre of Division street, leaving ample space for Allen to pass to the rear of the Prendergast car on Allen's right side of Division street, Allen negligently drove his car into the left side of the Prendergast car. The question of the negligence of each of these drivers was submitted to the jury with instructions by the court. Unquestionably in the collision the automobile of Allen was injured and Prendergast received personal injuries, the verdict of the jury indicates, therefore, that it found each driver guilty of negligence contributing to his own injury. This finding of the jury

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has been approved by said justice. After an examination of the evidence we find no sufficient reason to set aside the decision of said justice supporting the verdict in the case of Mr. Prendergast.

The plaintiff excepted to the ruling of said justice excluding a hypothetical question asked of the witness, Davis, with reference to the space within which the car of the defendant, Allen, could have been stopped in the circumstances immediately preceding the collision. In our opinion the justice might reasonably have permitted the question to be asked of the witness, who was clearly an expert in the use and operation of automobiles; but we think its exclusion should not be regarded as reversible error affecting the verdict, since the purpose of the question was to show the negligence of Allen, and the jury has found him to have been negligent.

The plaintiff has set out in his bill of exceptions the following: "2. Exception to the ruling of the court refusing to

grant plaintiff's request to charge numbered 1, 2 and 3, page 265 of the transcript." This is apparently intended as the statement of exceptions to three rulings of said justice refusing to charge as requested by the plaintiff. It offends against the provision of the statute requiring a party prosecuting exceptions to state in his bill the exceptions relied upon "separately and clearly." *Blake v. Atlantic National Bank*, 33 R. I. 109; *Dunn Worsted Mills v. Allendale Mills*, 33 R. I. 115, if we overlooked that defect we would still be unable to consider the exceptions as no request of the plaintiffs to charge appear on page 265 nor elsewhere in the transcript. Neither have they been brought before us by petition to establish the truth of the exceptions. All of the exceptions in the case of John J. Prendergast against Allen are overruled.

In the cases of Mrs. Prendergast and Miss Lucey the question arises as to whether the negligence of Mr. Prender-

gast in operating the automobile should be imputed to them. Plaintiffs' counsel has referred us to a number of cases in which it has been held that a wife, riding in an automobile driven by her husband, is not chargeable with the husband's negligence in operating said automobile, when the wife does not exercise or attempt to exercise any control over such operation. If in this case the negligence of Mr. Prendergast is imputed to his wife, such determination would not be made because of the marital relation, but because she was the owner of the automobile, that it was being operated by the husband for the wife in furtherance of a purpose in which she was an interested party, and because from those circumstances the relation of principal and agent would arise between Mrs. Prendergast and her husband. It appears that at the time of the collision the Prendergasts were returning from a day's outing at Pearl Lake near Franklin, Massachusetts; that for the purpose of carrying out this day of pleasure in which she was interested and took part she had furnished her automobile and, being unable to operate it herself, she had procured her husband to run it. In accordance with the rule of agency applicable with reference to a so-called "family automobile," the owner is undoubtedly chargeable with the negligence of another member of the family who is driving, if the owner is a passenger and it is being used for a purpose in the accomplishment of which the owner is interested. In such circumstances the relation of principal and agent arises between the owner and the member of the family driving the machine. The motion for new trial in the case of Mrs. Prendergast v. Allen was properly denied.

The plaintiff, Frances Lucey, was a young girl, about fourteen years of age, who was a guest of the Prendergasts upon this outing. The jury found that Mr.

Allen was negligent; the negligence of Mr. Prendergast is not to be imputed to Miss Lucey, and no claim is made that she was in any way guilty of contributory negligence. The uncontradicted evidence is that she suffered injury which was not very severe but which would entitle her to compensation from the defendant, Allen. It was error to deny her motion for new trial.

The exceptions of Mr. and Mrs. Prendergast are all overruled and the cases in which they are plaintiffs are ordered remitted to the Superior Court for the entry of judgment upon the verdict in each case.

The exception of Frances Lucey to the decision of said justice, denying her motion for new trial is sustained. Her case is remitted to the Superior Court for a new trial.

For Plaintiff: E. Raymond Walsh.

For Defendant: Curtis, Matteson, Boss & Letts.

SUPREME COURT

Peter R. Morris
vs.
Bernard V. Morris
et al. } Equity No. 528

RESCRIPT

(Before Tanner P. J., Below)

The original proceeding was by a bill in equity brought in the Superior Court for an accounting of partnership profits and capital. The complainant is Peter R. Morris and the respondents are his brothers, Bernard V. Morris, Patrick H. Morris and Thomas M. Morris. Terence P. Morris, the oldest brother of complainant and respondents, died intestate in 1900, and the parties to this suit with their sisters inherited the estate.

Terrence had established and conducted in Bristol a liquor and ice business, and a bottling establishment. At his death the four surviving brothers, par-

ties to this litigation, succeeded to the various businesses of their brother, Terrence, which were continued for some fourteen years, until the present litigation was begun in 1914. The capital of the business consisted of the property inherited from the brother, Terrence; no new capital was contributed by any of the surviving brothers. The respondents in their joint answer denied that there was any partnership with the complainant and this was the main issue.

The cause was referred to a master in chancery who found that complainant was a full partner in the business and also found the amount due to said complainant as his share of the partnership profits. Exception was taken to the report of the master by two of the respondents, Patrick and Bernard Morris, and then, for the first time, the claim was made by these two respondents before the Superior Court that the business conducted by the firm consisted in part of an illegal liquor business. The trial justice, after considering the report of the master and briefs of counsel, in a rescript stated that he had reached the conclusion that under the testimony he must resubmit the case to the master to find what were the assets of the business based upon the legal profits. He further stated that there was testimony to show that for about eight years a part of the business of Morris Brothers was the wholesaling of liquors without a license and also that a part of their business was that of peddling liquors illegally during the whole of said partnership business and that therefore he felt obliged to resubmit the case to the master for the purpose of separating the legal from the illegal gains, and granting an account based upon the legal gains of the partnership. All of the other exceptions of the respondents to the master's report were overruled.

Thereafter the master filed a supplemental report in which he failed to separate the legal from the illegal gains of said partnership and a final decree was

then entered by the Superior Court, dismissing the bill without prejudice for the reason that the master in his supplemental report had not separated the legal from the illegal gains of said partnership.

From this final decree the complainants, Patrick and Bernard Morris, have also appealed, the report having been accepted by Thomas Morris.

Upon an examination of the record and consideration thereof we find no error in the action of the trial justice in overruling all of the exceptions of the respondents as covered by rescripts of said trial justice of November 17 and November 22, 1920. We think, however, that the action of the trial justice in dismissing the bill for failure to separate the legal from the illegal gains was erroneous. From the evidence it is clearly established that the complainant was a member of the partnership which was composed of the four brothers, and as such was entitled to his share of the partnership profits. There were four distinct branches of the partnership business—the ice, farming, retail saloon and bottling business. Each business was carried on at a separate location. Peter Morris, the complainant, was a younger brother. He was a bartender in the retail saloon. He neither assumed nor was he allowed to undertake any part in the management and control of the business of the firm. Thomas and Patrick ran the bottling establishment. Patrick also ran the farm and the ice business. Bernard apparently attended mainly to the financial affairs of the company and to the rather crude bookkeeping of the firm. Bernard did not testify in the proceedings, neither were any of the books of account produced by him or the other respondents. From the testimony of the bookkeeper, Mrs. Wilson, it appeared that separate day books and ledgers were kept for the ice business and the bottling business; no books were kept for the retail saloon business which was a cash business.

That the respondents in the conduct of a part of the bottling business did violate the law by selling at times at wholesale and also by peddling liquor contrary to the statute, as they allege now, is doubtless true, although this contention inasmuch as it is now made by them for their own advantage properly is to be weighed with care by the court. Assuming that a part of the bottling business was conducted illegally, after a careful examination of the transcript of the testimony taken before the master, we do not find therein any evidence to warrant the conclusion that Peter Morris either participated in or had any control of any of the illegal transactions now asserted to have been carried on by the respondents. Such being the case, the claim of illegality in the conduct of a part of the business now made by the respondents is no defence to the claim of an innocent partner for his share of the partnership profits. It does not appear in the rescript that the trial justice considered this aspect of the cause, nor did said justice find that complainant was a participant in any illegal transactions; the action of the trial justice apparently was based simply on his conclusion that some of the partners had conducted in part an illegal business. Inasmuch as the witnesses did not appear before the trial justice, but were heard by the master, in considering the effect of the testimony we are in the same position as was the trial justice in considering the effect of the testimony. Having repeatedly and consistently throughout the progress of the litigation maintained that the complainant had nothing to do with the management or control of the business and that he was not consulted by the other partners in regard either to the policy or conduct of the business, it is too late now for respondents to change their position and assert the contrary, particularly as such assertion is contrary to the facts as established by the evidence.

Upon consideration of the testimony we have come to the conclusion that al-

though one branch of the firm business probably was conducted illegally by the respondents, yet as it appears that complainant was not a participant in any of the illegal transactions, we find that such illegality as existed is no bar to complainant's claim for his proportion of the partnership profits.

As the only objection made by the trial justice to the finding of the master was based not on the amount found to be due to complainant, but on the question of a separation of legal from the illegal gains of the business, in the view we take of the testimony this objection is no bar to the claim of complainant, and accordingly we are of the opinion that the report of the master should be confirmed and the exceptions thereto overruled.

The complainant's appeal is sustained. The appeal of respondents is denied and dismissed.

The parties may present a form of decree in accordance with this finding on July 3, 1922.

For Complainant: John P. Beagan.

For Respondent: Fitzgerald & Higgins and William Canfield.

SUPREME COURT

Susan H. Graham, Ex. }
vs. } Ex. &c. No. 5577
Walter C. Nye, et al. }

OPINION

(Before Sumner, J., Below)

STEARNS, J. This is a statutory action to recover damages for the death of one William F. Graham, on November 11 1919, caused by the alleged negligence of defendants, trustees and owners of the Imperial Apartments in the city of Providence.

The declaration alleges a violation by defendants of the duty imposed upon them by Chapter 129, Section 16, General Laws, which provides that every pas-

senger elevator shall be fitted with some suitable device to prevent the elevator car from being started until the door or doors opening into the elevator shaft are closed;" that as a consequence the operator of the elevator was enabled to and did move the elevator to one of the upper floors of the building while the door opening into the elevator shaft on the second floor was open; that the hallway on second floor was dark; that deceased, who was 76 years of age, was lawfully on the premises, that his eye sight was defective and he was not familiar with the premises; that upon coming from the ground floor of the building to the second floor hallway by means of the stairway, deceased walked through said open doorway leading into the elevator shaft and fell to the bottom thereof, receiving injuries from which he died on the same day.

The elevator was operated in a closed elevator shaft in the building which has six stories. In the hallway of each floor there was a sliding wooden door at the elevator entrance. The safety device on the elevator prevented the operation of the elevator whenever a door opening into the elevator shaft on any of the floors was open, with the exception of the door on the second floor. The apartment of the janitor of the building was on the second floor. The only entrance thereto was by a swinging door at the opening in the elevator shaft, and to leave this apartment and proceed to or from the hallway of the second floor, the occupant had to hold the elevator at the second floor and walk through the elevator to the hallway, the elevator on this floor being used apparently as a bridge from the hallway to this apartment. The janitor testified in regard to the elevator that "there was a safety device on the second floor but it was caught with nail so it did not catch;" this was done designedly; the people living in the janitor's apartment had to have it that way, and this condition had existed for a considerable time—as long as the janitor had been

there. There was a stairway running from the ground floor to the hallway on the second floor and thence to the hallways of the upper floors. The son of deceased occupied a room on the third floor. He was ill and the deceased on the morning of November 11 came to Providence to call upon him. Repairs were being made on the first floor of the building on this day and, according to the statement of the janitor, the elevator was not running to or from the first floor that day. The janitor and his wife shortly after 8 a. m. ran the elevator from the second floor to the upper floor and began cleaning the apartments as were their custom. Shortly after 3 o'clock the elevator was again at the second floor and the door opening into the elevator shaft on the second floor was open. Within ten or fifteen minutes thereafter the deceased was seen to enter the building, ascend the stairway and proceed toward the hallway in the direction of the stairway leading to the third floor which was near the entrance to the elevator. The hallway was dimly lighted with a single gas jet. The elevator at this time was at one of the upper stories. Deceased fell into the elevator well and was killed. The janitor testified that he was the only person who operated the elevator that day; that the tenants of the building usually left early and there was no occasion to use the elevator that morning except such use as he made of it in going to the different floors to clean them; that he made one or more trips in the elevator but could not say at what hours; that he saw the elevator door open that morning on the second floor only when he used it and when the elevator was there. All of the hallway elevator doors except the door on the second story had iron key holes and could be opened only by the operator of the elevator from the inside when the elevator was at the floor level; but the second story door had an opening in the place of a key hole and when closed could be opened easily from the outside by pushing

knife, pencil or stick through the opening.

The evidence is sufficient to warrant the conclusion that the door into the elevator shaft was open when deceased fell into the shaft; that the elevator was moved to an upper story while the door was open; and that deceased was not guilty of contributory negligence. The jury gave a verdict for plaintiff for \$5000. The trial justice granted defendants' motion for a new trial unless plaintiff remitted all of the verdict in excess of \$3500. Plaintiff took exception to this action of the trial justice. Defendants excepted to the refusal to direct a verdict in their favor and for certain other reasons. The case is now in this court on the bills of exceptions of both plaintiff and defendants.

The defendants claim that the object of the statute is to prevent injury to persons, by elevator cars only when they are in motion and to prevent accidents when passengers are entering or leaving an elevator and to prevent the starting of the car before the entrance or exit is accomplished; that the statute does not require that doors leading into the shaft must be kept closed or be so equipped that they can not be opened from the outside when the elevator is not in motion but at rest, nor that elevator cars must be opposite the floor level of a shaft door when such door is open.

An unprotected elevator well or shaft in a building is a place of danger. In ascertaining the meaning of the act it is proper to consider the ordinary construction and use of elevators and the danger sought to be guarded against. One manifest danger is any unguarded opening into the elevator well. Section 15, Chapter 129, provides that any elevator running in a building where "the well of which elevator is not so protected as to be inaccessible from without while the elevator is moving" shall be equipped with an automobile warning signal device which shall give an automobile warning signal that the elevator is in

motion on every floor of the building which the elevator approaches. Section 16 provides that all elevator openings through floors where there is no shaft shall be protected by sufficient railings, trap doors or other mechanical devices equivalent thereto. Having thus provided for the protection of openings in the floors in buildings where there is no elevator shaft, provision is then made in regard to buildings where there is an elevator shaft: "Every passenger elevator * * * shall be fitted with some suitable device to prevent the elevator car from being started until the door or doors opening into the elevator shaft are closed." If defendants' construction of the act is correct the elevator door on every floor of the building might lawfully be left open when the elevator was not running and all doors could remain open when it was running, with the exception of the door on the particular floor on the level of which the elevator was in motion. The need of protection from an opening in the floor is the same whether an elevator runs in a shaft or in a place which is not enclosed. If the protection of passengers while entering or leaving the elevator was the sole object of the act, it would have been necessary only to provide that the door on the level on which the elevator was at the time should be closed before the elevator could be started. But the act specifically provides that not only that door, but doors opening into the elevator shaft shall be closed before the elevator can be used. The safety device required by the statute must be so constructed that in order to operate the elevator at all every door on the elevator shaft must be closed and kept closed. Additional protection of the openings into the elevator shaft is thus provided by reason of the fact that the lawful use of the elevator is only possible when all doors are closed. No particular locking device is required, but the intent of the act is that all of the doors must be closed before the elevator is moved. The doors

must be secured or at least latched in such manner that they can not conveniently and easily be opened by any person on the outside. In *Weeks v. Fletcher*, 29 R. I. 112, and in *Baynes v. Billings*, 30 R. I. 53, it was held that the provisions of this act were for the benefit of all persons, whether in or out of the elevator who are upon the landlord's premises, as employees, or by his invitation and that if the neglect of any of its provisions cause damage to such person without his fault, the act gives a right of action therefor.

The present case is quite different from *Hope v. Longley*, 27 R. I. 579, to which our attention is called by the defendants. In the *Longley* case it appears that the plaintiff, who had previously been employed to make repairs on the elevator when needed, was familiar with the premises; he knew that the elevator was in the habit of creeping, that it could have crept while the door was closed. Plaintiff walked into the elevator pit, through the door on the ground floor which was open, the elevator at the time being at the top of the building. The accident happened in the early morning. This door had been closed and locked the night before by the person who had last used the elevator and there was no evidence that any employee of defendant opened the door after it had been locked the night before. It was held that a non-suit was properly granted on the ground that defendant was not guilty of any negligence in not keeping a servant at the elevator during the night to see that the door was kept closed. In the case at bar the leaving of the door open was the proximate cause of the accident. The negligence complained of was the violation of an obligation imposed by statute. The negligence was continuous; the allegations to this effect in the declaration properly stated a cause of action. Defendants' objection to the form of the declaration is overruled. There was no error in the admission of evidence showing the lack of a safety device on the door of the

second floor prior to the accident, as the situation then was the same as at the time of the accident and continued unchanged. Moreover, the janitor in his deposition already had testified without objection to the same effect. The only other objection which requires mention is in regard to the reduction of the amount of the damages. This question was carefully considered by the trial justice and the reasons for his decision on this question appear in his report. We agree with the conclusion reached by him and the plaintiff's exception to this action of the justice is overruled.

All of the exceptions of the plaintiff and the defendant are overruled. The case is remitted to the Superior Court for a new trial unless the plaintiff on or before July 9, 1922, shall file in the Superior Court her remittitur of all (of said verdict in excess of \$3500. In case the plaintiff shall duly file such remittitur the Superior Court is directed to enter its judgment for the plaintiff for \$3500.

For Plaintiff: P. W. Gardner, Sidney Clifford and Pirce & Sherwood.

For Defendant: Alfred G. Chaffee.

SUPREME COURT

Joseph Percelay
vs.
Jenckes Spinning Co. } Ex. &c. No. 5551

RESCRIPT

(Before Doran, J., Below)

This is an action of assumpsit brought by Joseph Percelay, doing business as the Central Waste Company, against Jenckes Spinning Company, based upon a contract in writing, made September 3, 1918. The plaintiff claims that at the time the contract was executed he was carrying on business under the name of the Central Waste Company. Under the agreement referred to it was

provided that the Spinning Company was to sell to the Waste Company "100,000 pounds of cable cord seconds on tubes at forty-eight cents per pound, our estimated entire production from January 1, 1919, to January 1, 1920."

The plaintiff claims that the defendant broke its aforesaid contract, in that it failed to deliver goods in accordance therewith and that he suffered damage which he now seeks to recover.

The case was tried in the Superior Court before a justice thereof sitting with a jury and a verdict was returned for the defendant. The motion of the plaintiff for a new trial was denied by the trial justice on the ground that the testimony was conflicting and that he could not say the weight of the evidence supported the plaintiff's claim.

The plaintiff took 80 exceptions at the trial of the case in the Superior Court of which 51 are now presented for our consideration. Of the 51 exceptions 48 relate to the admission and rejection of testimony.

The remaining three exceptions are: (a) to the ruling of the court in connection with a certain part of the charge; (b) to the ruling refusing to grant plaintiff's requests to charge 1, 2, 3, 4, 5, 6, 7, 8, and (c) to the decision of the court denying plaintiff's motion for a new trial.

Between September 3, 1918, and December 17, 1918, the defendant delivered approximately 21,887 pounds of cable cord seconds. These deliveries were made prior to the date fixed for deliveries by the contract and were as the defendant claims made at the request of the plaintiff who apparently had an earlier use for the goods than he anticipated at the date of the contract. The plaintiff denied, however, that these deliveries were on account of the contract and contends that he received no delivery thereunder. It appears, however, from the testimony that it was the practice of the defendant to mark all orders when received with a number and to place said order number

on all invoices and also the cases containing the goods which the order included, and that the boxes in which these early deliveries were made and the invoices sent in connection therewith were marked "Order No. 239," which was the number to be employed in deliveries under the contract.

The plaintiff claims that in January, February and March, 1919, he was frequently asking, over the telephone, for the delivery of goods under the contract and was informed by the defendant that it was not making any cable cord seconds. There was some limitation in the event that they should not be producing the goods described therein. The plaintiff offered some testimony tending to show that the defendant was selling goods of a similar character to other parties.

The defendant denies that the plaintiff made requests by telephone and the plaintiff does not claim that he at any time sent any communication in writing asking for the shipment of goods.

The defendant further says that during the latter part of December, 1918, the plaintiff several times returned shipments of goods and that in January, 1919, when the plaintiff refused to accept another shipment of eleven cases a letter was sent to him under date of January 7, 1919, cancelling the contract on the ground that the plaintiff had returned goods, refused to accept goods which the defendant attempted to deliver, and had failed to pay for goods in accordance with the contract.

The plaintiff denied the receipt of such a letter, but we think there is testimony from which the jury might reach a different conclusion.

The defendant claims that it heard nothing further from the plaintiff until September 17, 1919, when the latter, by a letter of that date, demanded deliveries. To that letter the defendant replied, calling the attention of the plaintiff to the previous cancellation of the contract.

There is testimony to the effect that in January, February and March, 1919, when the plaintiff claims that he was asking over the telephone for deliveries, the market price of cable cord seconds was low, but that there was a better market for such goods in September, 1919, when the plaintiff made a demand for further deliveries after a silence, as the defendant claims, of more than six months following the notice of the cancellation of the contract.

If the letter of the defendant should be excluded from consideration there is other testimony from which the jury might find that the plaintiff had failed to comply with the terms of the contract.

The plaintiff has devoted much of his brief and argument in an effort to convince this court that the trial justice erred in permitting defendant to introduce in evidence a certain certificate made by Esther Percelay and filed in the clerk's office of the city of Central Falls, such certificates stating that she was the owner of the business which was being carried on under the name of the Central Waste Company.

In this connection the plaintiff also claims error on the part of the trial court as to portions of its charge covering the matter of ownership.

These objections of the plaintiff are based upon his contention that evidence cannot be introduced under the plea of the general issue affecting the right of the party to bring suit but that the same must be specially pleaded. We cannot concede this claim. It devolved upon the plaintiff to show that he was the person doing business under the name of the Central Waste Company. He testified in his direct examination that he was the owner of the Central Waste Company in September, 1918, and that at that time no other person had any ownership in that concern.

We think that it was perfectly proper for the defendant to show by any competent evidence that Joseph Percelay was not the person who owned and was

carrying on the business of the Central Waste Company at that date, being the date of the contract with the defendant. It is to be noted that later in his testimony Percelay says that if Esther, his wife, signed the paper it was true and that afterwards she admitted the signature to be hers. This would render the admission proper.

The certificate of ownership by Esther Percelay was not the only evidence in the case relating to that question. She signed checks as the proprietor of the business, such checks being drawn against the funds of the concern which were deposited and stood to her credit in the bank.

The questions arising in the course of the trial in the Superior Court were very largely questions of fact. The trial justice, who saw and heard the witnesses and who later weighed the testimony, found it impossible to decide that the weight of the evidence supported the plaintiff's claim, and from our examination we must concur in the view which he has expressed in his rescript.

Upon examination of the other exceptions of the plaintiff, we fail to find anything amounting to reversible error.

Plaintiff's exceptions are all overruled. The case is remitted to the Superior Court with direction to enter judgment for the defendant on the verdict.

For Plaintiff: Cooney & Cooney and George Helford.

For Defendant: Charles A. Walsh and John Henshaw.

SUPREME COURT

John M. Giblin
vs.
Dunjoy Hardware Co. } Ex &c. No. 5568

OPINION

(Before Brown, J., Below)

SWEENEY, J. This is an action of trespass on the case for negligence. The

declaration alleges that while the plaintiff was operating a taxicab, a servant of the defendant corporation so negligently operated its motor delivery truck that it ran into the taxicab the plaintiff was operating and severely injured him.

At the close of the plaintiff's testimony the defendant rested its case without introducing any testimony and moved for a direction of a verdict in its favor. After argument the court denied this motion and the defendant's exception was noted. The case was then submitted to the jury after argument by the attorneys for the defendant and the plaintiff and the charge of the court and the jury returned a verdict for the plaintiff. The defendant then duly brought the case to this court by its bill of exceptions without making a motion for a new trial. Several exceptions are stated in the bill, but the only one now claimed is to the denial of the defendant's motion for a direction of a verdict.

The plaintiff proved that the motor truck was registered and owned by the defendant corporation. Defendant's motion for a direction of a verdict was based upon the claim that the plaintiff had not shown by competent evidence that the driver of the truck, at the time of the accident, was the servant of the defendant and that the plaintiff should have introduced testimony tending to show that the driver of the truck, at the time of the accident, was the servant of the defendant and acting within the scope of his employment.

The trial justice charged the jury that if they were satisfied that the auto truck "was the property of the defendant then that fact would warrant the further presumption that at the time of the accident it was being operated on the highway by the servant of the defendant corporation, and that that servant was in the discharge of his duties as such servant, and acting within the scope of his authority. All of these things you would be warranted in assuming to be facts from the testimony

as it appears before you at the present time."

Chapter 454, Public Laws, 1909, requires every owner of a motor vehicle, before using it upon the public highways, to file with the State Board of Public Roads a statement under oath of his name with a brief description of the motor vehicle owned by him and, upon the payment of the proper fee for registration, the board will register such motor vehicle and assign to it a distinguishing number and issue to the owner a certificate of registration for such motor vehicle. This distinguishing number must be placed upon the vehicle so that it can be seen and said certificate must be carried upon such motor vehicle when the vehicle is operated upon the public highways. Said chapter also provides that if the owner of a motor vehicle so registered shall transfer his interest therein to some other person such registration shall expire immediately upon the transfer of such ownership, and that when he transfers his interest in such motor vehicle to some other person he shall also file with the said board a written notice containing the name and place of residence of the new owner and the date of such transfer. The law also provides that no person shall operate a motor vehicle upon the public highways of the State unless it shall be duly registered.

An important reason for requiring motor vehicles to be registered and the distinguishing number assigned to the vehicle displayed upon it is to give a person injured by the operation of such vehicle an opportunity of identifying the owner thereof. Under the law above referred to a motor vehicle cannot be lawfully operated upon the public highways unless duly registered by the owner thereof. The defendant corporation had the motor truck duly registered and the distinguishing number assigned thereon displayed upon it at the time of the accident. No notice of defendant's transfer of interest in the motor vehicle had been filed with said board by the de-

fendant; and under these facts the plaintiff could rely upon the presumption that the requirements of the law had been complied with and that the defendant was the owner of the motor vehicle at the time of the accident. The plaintiff having proved that the motor vehicle was owned by the defendant at the time of the accident, it was a reasonable presumption that it was being used in the defendant's business at that time. This presumption, however, is a rebuttable one and may be met and overcome by the evidence of the defendant. *Berger v. Waigon*, 106 Atl. (R. I.) 740; *Bogorad v. Dix* 176 App. Div. (N. Y.) 774; *McCann v. Davison*, 145 App. Div. (N. Y.) 522; *Long v. Nute*, 123 Mo. 204; *Langworthy v. Owens*, 116 Minn. 342; *Wood v. Indianapolis Abattoir Co.*, 178 Ky. 183; *Patterson v. Milligan*, 12 Ala. 324; *Vonderhorst Br. Co. v. Amrhine*, 98 Md. 406

Substantially the same question raised in this case was before this court in the case of *Burns et al. v. Brightman et al.*, 44 R. I. —. The trial justice charged the jury that, as the defendants had admitted that the automobile involved in the accident was theirs, if no other evidence was produced this was a prima facie case which would warrant the jury in drawing the conclusion that the person in charge of the machine was engaged in the employment of the defendant; but as the defendants had testified that the driver of the machine was not their servant and not in their employ this issue was to be decided upon consideration of all of the testimony. This court said, in overruling an exception to this portion of the charge, "The presumption referred to by the trial judge, which made a prima facie case, meant simply that plaintiffs had introduced sufficient evidence to require defendants to present their case. This having been done the jury was instructed to decide the issue upon all of the facts in evidence."

In the case of *Benn v. Forest*, 213 Fed. Rep. 163, in the Circuit Court of Ap-

peals the rule of proof was stated to be, "If the chauffeur was not running the car at the time of the accident as the servant of the defendant the fact was peculiarly within the defendant's knowledge and the burden is on him to establish it."

The general rule applying to this question is stated in 10 R. C. L. Evidence, Sec. 45, as follows: "The term 'burden of proof' has two distinct meanings. By the one is meant the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises; by the other is meant the duty of producing evidence at the beginning or at any subsequent stage of the trial, in order to make or meet a prima facie case. Generally speaking, the burden of proof, in the sense of the duty of producing evidence, passes from party to party as the case progresses, while the burden of proof, meaning the obligation to establish the truth of the claim by a preponderance of evidence, rests throughout upon the party asserting the affirmative of the issue, and unless he meets this obligation upon the whole case he fails. This burden of proof never shifts during the course of a trial, but remains with him to the end. * * * Slight evidence is sufficient to shift the burden of proof of a fact from the plaintiff to the defendant, where the knowledge of such fact is peculiarly within the knowledge of the defendant, and which, in the nature of things, it would be difficult for the plaintiff to prove."

The defendant has cited several cases from other States in support of its contention, but this court is of the opinion that the rule announced in *Burns et al. v. Brightman et al.*, *supra*, and sustained

here is more in accord with better reason and the weight of authority.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment for the plaintiff upon the verdict.

For Plaintiff: A. G. Chaffee and J. A. Bennett.

For Defendant: Green, Hinckley & Allen.

SUPREME COURT

Industrial Trust Co.,

Ex. and Tr.

vs.

M. Etta Babcock Gardner,
et al.

Equity

No. 549

OPINION

SWEENEY, J. This is a bill in equity brought by the executor and trustee of the will of Franklin N. Babcock, late of the town of Warwick, for the advice and direction of this court in administering the estate of said deceased. The cause has been certified to this court under authority of Section 35, Chapter 239, General Laws, 1909.

Mr. Babcock in his will, in addition to appointing an executor and ordering his funeral expenses and expenses of administration paid out of his estate, provided that the inheritance taxes and taxes assessed against the legatees should be paid, and directed his executor to provide perpetual care for the burial lot of his father.

In the ninth paragraph of his will he makes a specific gift of some household furniture and he disposes of the remainder of his property by four general pecuniary legacies. Two of these general legacies (bequests Nos. 5 and 7) are gifts of \$10,000 and \$2,000, respectively, and the other two general legacies (bequests Nos. 4 and 6) are gifts of \$20,000 and \$10,000, respectively, in trust.

The disposal of the residue of his es-

tate is made by the eleventh paragraph of his will, which is as follows: "Eleventh: I direct my executors to sell all personal property, not otherwise disposed of, also all real estate I may die seized and possessed of * * * the proceeds of said personal and real estate to be added to the bequests, No. 4 and No. 6, share and share alike, after all expenses of every description have been settled.

Four of the legatees have answered the bill and a decree pro confesso has been taken against the other interested parties.

The question submitted to this court is whether said paragraph eleven is in the nature of a residuary provision and whether the executor may pay from the proceeds of the sales of the real estate and personal property the expenses of administration, the debts of the deceased, and the legacies given by the preceding paragraph in the will.

The answering legatees claim that said paragraph should be construed to be a general residuary provision in order to carry out, as far as possible, the intent of the deceased as shown in the other paragraphs of his will.

From a reading of the will it is apparent that the deceased intended to dispose of all of his property by will, that he had a high regard for the legatees named therein, and that it was his intention that they should share in the distribution of his estate to the amounts as expressed in his will.

It is reasonable to suppose that a man who makes a will does not intend to die intestate as to any part of his property. *Pell v. Mercer*, 14 R. I. 412; *Smith v. Greene*, 19 R. I. 558.

It is stated that the deceased was a man advanced in years, a widower with no children, that at the time of his death his personal property was less than \$5000, and that he owned some valuable real estate. On account of the small amount of personal property, if said eleventh paragraph is not construed to be a general residuary provision it will

give the fourth and sixth general legacies a preference over the fifth and seventh general legacies, and the legatees mentioned in the fifth and seventh legacies may not receive anything on account of the insufficiency of the personal estate.

It is clear that the testator intended that the legatees mentioned in the fifth and seventh bequests should receive from his estate the sums given to them and in order to carry his apparent intention into effect the court construes said eleventh paragraph to be a general residuary provision.

The executor requests advice and direction as to whether it may pay from the proceeds of the sale or sales of said personal property and real estate described in said paragraph eleven any expenses other than those incident to such sale or sales, in the event that the estate is not sufficient to pay all of them in full.

The executor is advised and directed that it may pay from the proceeds of such sale or sales the expenses of administration, inheritance and legacy taxes, and all lawful claims against said estate. Out of any balance remaining the executor may pay the general legacies mentioned in the fourth, fifth, sixth and seventh paragraphs of said will. If said estate is insufficient to pay all of said legacies in full they must abate proportionably, and in such cases the executor may pay out the residue of the estate pro rata to said legatees. *Derby, Ex. v. Derby et als., 4 R. I. 414.*

The parties may present to this court a form of decree in accordance with this opinion, July 3, 1922, at nine o'clock a. m., Standard time.

For Complainant: Huddy, Emerson & Moulton.

For Gardner: George M. Breaden.

For Other Respondents: Felix Hebert and Quinn & Kernan.

SUPREME COURT

Patrick McVay
vs.
Walter L. Kelley } Ex. &c. No. 5617

RESCRIPT

(Before Hahn, J., Below)

This is an action in assumpsit brought to recover a portion of the proceeds of a mortgagee's sale of real estate. The case was tried before a justice of the Superior Court sitting without a jury and a decision was rendered for the defendant.

The case is now before us upon the exception of the plaintiff to the decision of the trial court.

One Joseph D. Nadeau was the owner of certain real estate in the city of Pawtucket, Rhode Island. He placed thereon three mortgages, one to a man by the name of Wright for \$1850, dated February 12, 1916; another to Herbert I. Mathewson for \$800, dated December 27, 1916, and the third to said Mathewson for \$700, dated September 20, 1918.

The last-named mortgage was foreclosed by Mathewson, March 27, 1920, and the property was struck off to Kelley, the defendant here, for \$2300, the sale being made subject to the two prior mortgages.

Mathewson, after deducting the sum of \$700, due on his mortgage, it being the third mortgage upon the property, together with the expenses incident to the sale, turned over the balance of \$1507, to Kelley. It is to recover this sum that the plaintiff has brought his suit.

Subsequent to these mortgages two attachments were placed upon the property, the first one, September 26, 1918, in a suit brought by the defendant, Walter L. Kelley, against Nadeau, and the second by the plaintiff, Patrick McVay, against Nadeau, August 18, 1919. Kelley obtained judgment for \$2146 on December 27, 1919, and execution was issued thereon December 29, 1919. He made no attempt however to bring about a sale under said execution and the appar-

ently abandoned his attachment.

McVay obtained judgment for \$2500 in October, 1919, execution was levied November 14, 1919, and a sale under said execution took place February 21, 1920, at which McVay became the purchaser for \$100.

We need not further discuss these attachments. The sale under the third mortgage to Mathewson wiped out any lien which either Kelley or McVay could have had.

The mortgage, which was foreclosed and under which a sale was effected subject to prior liens, provided that the surplus of the proceeds of the sale should be paid to the mortgagor, his heirs, executors, administrators or assigns. They were not so paid but were turned over to Kelley between whom and McVay there is no privity.

Whether or not McVay would have a claim against Mathewson, the mortgagee, or whether Kelley or McVay would be entitled to maintain a suit in equity to enforce a lien against the surplus proceeds, are questions which we are not called upon to decide.

We think it is clear that the present suit against Kelley cannot be maintained and that the decision of the trial court in favor of the defendant was fully warranted.

The plaintiff's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the decision.

For Plaintiff: Thomas L. Carty.

For Defendant: J. E. Brennan.

SUPREME COURT

Richard W. Jennings,
General Treasurer

vs.

United States
Bobbie & Shuttle
Company

Ex. &c. No. 5578

OPINION

SWEENEY, J. This is an action on the case to collect a corporate excess

tax alleged to be due the State. The action was brought in the Superior Court and, upon an agreed statement of facts being filed, was certified to this court for hearing and determination under authority of Section 4, Chapter 298, General Laws, 1909.

The declaration alleges that June 1, 1920, the Board of Tax Commissioners assessed against the defendants a corporate excess tax in the sum of \$1264.09 in accordance with the provisions of Chapter 769 of the Public Laws, passed at the January Session, 1912; that said tax was payable July 1, 1920; and that the tax was duly certified for collection by said Board to the plaintiff.

It appears from the agreed statement of facts that the defendant was incorporated under the laws of the State of New Jersey; that November 13, 1919, the stockholders consented that said company be forthwith dissolved; that upon or about December 29, 1919, the defendant filed an affidavit in the office of the Secretary of State in New Jersey, showing that the consent of the stockholders to dissolve the corporation had been advertised; that December 30, 1919, the directors of the said defendant met at Providence, R. I., and passed a vote authorizing the execution of a deed conveying all of the assets of the defendant; that deeds conveying all of the said assets were executed and delivered December 31, 1919; that the defendant continued business in this State until the usual hour for closing business, December 31, 1919; that thereafter the only business transacted by the defendant was in paying its indebtedness then outstanding and paying its stockholders a dividend in liquidation; and that March 1, 1920, it made a return to said Board of Tax Commissioners, as of December 31, 1919, of the facts required by Section 9 of said Chapter 769.

The defendant claims that because it did not carry on business for profit in this State after December 31, 1919, it is not liable for the corporate excess tax assessed against it, June 1, 1920.

The question arising in this action is.

Is the defendant liable for a corporate excess tax assessed against it, June 1, 1920, when it did not carry on business for profit in this State at any time during the year 1920?

Said Chapter 769, known as "The Tax Act of 1912," took effect February 15, 1912. "It was the introduction of a new system of taxation which amounted to an entire revision of the theory and practice of assessing and collecting taxes for the State." *Mexican Pet. Corp. v. Bliss et al.* 43 R. I. 243.

Section 9 of said act provides that every corporation (with certain exceptions) carrying on business for profit in this State shall pay an annual tax to the State upon the value of that portion of its intangible property called its "corporate excess," and Section 11 prescribes the method for the determination of the value of the corporate excess for the purposes of assessment and taxation. The act thus created a new classification of property of every corporation subject to taxation if the corporation carried on business for profit in this State. Said Section 11 also provides that said Board on the first business day of June in each year shall make up a list of all corporations, subject to tax upon their corporate excess, with the amount of the corporate excess of each, and shall assess a tax upon each such corporation at the rate of forty cents for each \$100 of the amount of its corporate excess and enter the amount of the tax against the name of each such corporation. The Board is required to forthwith mail a notice of the amount of the tax to each such corporation; and the tax so assessed is payable on the first day of the following July. Said act also provides that the owners of shares of stock in a corporation which is liable to tax upon its corporate excess shall be exempt from taxation thereon. Section 20 and eighth paragraph of Section 39. The act also provides that such tax, if unpaid, shall constitute a lien upon the real estate of

the corporation for the space of two years after the assessment thereof.

For the purpose of assisting the Board in the determination of the amount of such tax, it is provided that every corporation liable thereto shall on or before the first day of March in each year return to said Board, as of December 31 next preceding, a statement of certain financial facts. From this statement or return, or from other information, the Board shall annually fix the fair cash value of the capital stock of each corporation for the said year or lesser time the corporation has carried on business.

In the construction of statutes there is a presumption that they are intended to operate prospectively only and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them or unless the intention of the Legislature cannot be otherwise satisfied. *R. C. L.*, Section 307. Statutes.

There is nothing in the Tax Act to show that it was intended by the Legislature to have a retrospective effect. The radical changes made in the method of assessing and collecting taxes for the State, including the classification and taxation of corporate excess, make it clear that the Tax Act was intended to operate prospectively.

By the express terms of the Tax Act the owners of stock in corporations subject to the corporate excess tax are exempt from taxation thereon. If the value of the capital stock of each corporation defendant were carrying on business in this State in 1911 the owners of shares of its capital stock were liable to pay taxes thereon during the year 1911, to the city or town in which such owners lived. In 1912 they would not be liable to such local tax because the corporation would be liable to assessment for a tax upon its corporate excess. This is the effect of the decision of this court in the case of *R. I. Hospital Trust Co. v. Rhodes et als.*, 37 R. I. 141. The question in this case was whether the traction company was carrying on business

for profit in this State in 1912 and the court decided that it was. June 1, 1912, the Board of Tax Commissioners assessed a corporate excess tax against said traction company and June 15, 1912, the assessors of taxes of the city of Providence assessed a local tax against the trustees of the owner of stock in said company. This court held that the assessment made by the assessors of taxes was invalid as the stock was not subject to local assessment.

If this court should hold that the assessment made June 1, by the Board of Tax Commissioners upon the corporate excess, is for carrying on business during the preceding year it would give a retrospective effect to the Tax Act which is not warranted by any words in the act. It would also have the effect of deciding that all city or town taxes assessed during the year 1911 against the owners of stock in corporations subject to a corporate excess tax are invalid because June 1, 1912, the State Board assessed a tax for corporate excess against such corporations.

The fact that the corporation is required to make a return to the State Board before March 1, in each year, showing certain financial facts, as of December 31 next preceding, for the purpose of assisting the Board in the determination of the value of the stock of such corporation and to determine the amount of the corporate excess and assess a tax thereon June 1, does not cause the tax assessed June 1 to be due for the year ending December 31 next preceding.

The Board does not make the determination of the value of the capital stock solely upon the facts stated in the return but used these facts in connection with such other information as it may have, and bases its judgment upon all of the information the Board possesses.

The court is of the opinion that as the corporate excess tax assessed June 1, 1912, was for the year 1912, the annual corporate excess tax assessed thereafter was for the year in which the tax

was assessed and, consequently, the corporate excess tax assessed June 1, 1920, against the defendant was for the year 1920. As it appears that the defendant was not carrying on business for profit in this State during the year 1920, it is not liable for the corporate excess tax assessed against it, June 1, 1920, by said Board, and decision is rendered for the defendant.

The papers in said cause with our decision certified thereon are ordered to be sent back to the Superior Court for the entry of final judgment upon the decision.

For Plaintiff: Herbert A. Rice and Lester Walling.

For Defendant: F. A. Jones.

SUPREME COURT

Daniel Kitchen	}	Ex. &c. No. 5624
vs.		
Leon Rosenfeld		

OPINION

(Before Blodgett, J., Below)

RATHBUN, J. This is an action of trespass on the case of malicious prosecution. The trial in the Superior Court resulted in a verdict for the plaintiff for seven hundred dollars. The case is before us on the defendant's exceptions as follows: To the refusal of the trial justice to direct a verdict for the defendant and to the ruling of said justice denying the defendant's motion for a new trial.

The plaintiff occupied a basement apartment in an apartment house owned by the defendant. For a short period the plaintiff was employed as a janitor by the defendant at said apartment house. The defendant discharged the plaintiff and a short time thereafter accused the plaintiff of wasting hot water in his apartment. The defendant complained to the police that the plaintiff had, during an argument which followed the accusation, threatened to kill the defendant.

The police department investigated this complaint and also a further complaint of the defendant that the plaintiff had intentionally damaged the plumbing connected with a toilet in said house. The police refused to prosecute and thereafter the defendant employed an attorney to draft two criminal complaints against the plaintiff. The defendant furnished surety for costs and warrants were issued upon which the plaintiff was arrested and detained in a cell until the following day when he obtained bail. One of the complaints charged that Kitchen threatened to kill the defendant; the other charged that Kitchen wantonly and maliciously injured and defaced a building. On trial of these complaints Kitchen was found not guilty and was discharged, in each case. Thereafter Kitchen commenced this suit for malicious prosecution.

It is clear that the defendant instituted and prosecuted said criminal complaints and that on trial Kitchen was adjudged not guilty and was discharged. Has the plaintiff sustained the burden which the law casts upon him of proving that the prosecution of at least one of said complaints was commenced maliciously and without probable cause? The defendant was informed that just before the toilet in question was discovered to be in a damaged condition, the plaintiff had been seen coming out of another bath room located on the same floor as the toilet which was damaged. The defendant obtained no further evidence tending to show that the plaintiff damaged the plumbing connected with said toilet. In defence the defendant relied upon the fact that he was advised by a practicing attorney that there was probable cause for commencing the prosecution of each complaint. The defendant testified that he stated all of the facts to his counsel and that said counsel advised him that there was probable cause for prosecuting each of said complaints. The law of this State is in accord with the great weight of authority, which is that the prosecutor will be protected if he acts upon the advice of a

competent, disinterested and regularly admitted practicing attorney and counsellor of law in good standing that probable cause for commencing prosecution exists, provided the prosecutor honestly believes the accused is guilty and makes a full, fair, frank and free disclosure of all the circumstances to the counsel who advises him. See *Lee v. Jones*, 44 R. I. , 116 Atl. 201; *Fox v. Smith*, 25 R. I. 255; 26 Cyc. 30 and 31; note to *Ross v. Hickson*, 26 Am. St. Rep. 141. I

Whether the prosecutor acted upon advice of counsel and whether he made a complete disclosure of all the facts and circumstances are questions of fact for the jury. *Fox v. Smith*, supra. The mere statement of a prosecutor, in giving evidence in his defence, that he made a full and fair disclosure of all the facts to his counsel, is not conclusive. What he stated should be proved and the jurors should decide whether the statement made was a full and fair one or not. *McLeod v. McLeod*, 73 Ala. 42. See *Fox v. Smith*, supra.

The attorney whom the defendant consulted did not testify and the defendant did not state in detail what he told the attorney. Upon cross-examination the defendant that the plaintiff was seen coming out of the bath room containing the toilet which was damaged. Mrs. Silverstein is the person who saw the plaintiff coming out of a bath room on the same floor as the damaged toilet. She gave this information to a Mr. Taylor, the janitor, who in turn reported the fact to the defendant. The damaged toilet was located in a bath room at one end of the hall. Mrs. Silverstein told Mr. Taylor that she saw the plaintiff coming from another bath room at the opposite end of the hall and that said toilet had apparently been damaged before the plaintiff came out of the other bath room. Mr. Taylor testified that he reported these facts to the defendant who did not deny that he was told by Taylor that Mrs. Silverstein saw the plaintiff coming from the other bath room. As the apartment house in question contained forty tenants, all of whom

had access to the bath room containing the toilet which was damaged, the plaintiff had no exclusive opportunity to injure said toilet. It not only appeared that the defendant had no probable cause for instituting criminal proceedings against the plaintiff for injury to said toilet, but it also appeared that the defendant, either carelessly or intentionally, misrepresented the facts to the attorney whose advice he sought. Had the defendant told his counsel that the plaintiff had been seen coming from another bathroom at the opposite end of the hall instead of representing that the plaintiff had been seen just before the damage was discovered coming from the bath room containing the toilet in question, it is probable that said attorney, there being no other evidence (other than that of a possible motive) that the plaintiff was guilty, would have advised that there was not probable cause for prosecuting the plaintiff for injuring and defacing a building.

The question remains whether the defendant in prosecuting the plaintiff was actuated by malice. Malice may be inferred from lack of probable cause when the facts warrant such inference. *Atkinson v. Birmingham*, 44 R. I. 116 Atl. 205. There was an abundance of testimony that the defendant was extremely hostile toward the plaintiff. The jury evidently found that the defendant's conduct in instituting one of the criminal proceedings against the plaintiff was malicious and without probable cause and we think the testimony warrants such finding.

The remaining exception is to the ruling denying defendant's motion for a new trial. We cannot agree with the defendant's contention that the damages are excessive. During eighteen hours the plaintiff was in the custody of the sheriff and during one night he was confined in a cell. Plaintiff testified that he paid seventy-five dollars for counsel fees and seventy-five dollars to secure bail. He testified to no other items. Regardless of the question of punitive damages five hundred and fifty dollars is not, in our

opinion, an excessive amount to compensate the plaintiff for the indignity which he suffered. The trial court in his rescript denying the motion for a new trial used the following language: "The present defendant was at one time convicted of perjury, and this fact was laid before the jury in this case. Were it not for such testimony affecting the burden of proof there would not be much doubt in the mind of the court that plaintiff had not sustained the burden of proof." Counsel for the defendant suggests that said justice assumed that the burden of proof shifted from the plaintiff to the defendant when it appeared that the defendant had once been convicted of perjury. It is clear that said justice intended to use the words, "preponderance of the evidence" in place of the words, "burden of proof." We find no reason for disturbing the verdict, which has the approval of the trial court.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict.

For Plaintiff: C. R. Easton.

For Defendant: John L. Curran.

SUPREME COURT

State of Rhode Island	} Ex. &c.
vs.	
John Whitford	

OPINION

(Before Brown, J., Below)

RATHBUN, J. This is a criminal complaint, charging the defendant with being "a lewd, wanton and lascivious person in speech and behavior," in violation of Section 25, Chapter 347, G. L., 1909. The defendant, having been adjudged guilty by the District Court of the Third Judicial District, appealed to the Superior Court. The trial in the Superior Court resulted in a verdict of guilty. The case is before this court on the defendant's exceptions, as follows: To the re-

fusal of the trial court to direct a verdict for the defendant; to the admission of testimony; to the refusal to charge as requested, and to the denial of the defendant's motion for a new trial.

The evidence shows that Mrs. Anna Paine, a colored woman, induced Bertha Buck, a white girl, who testified she was sixteen years of age but who, according to the record, appears to be a little girl, to leave her place of employment and live in the home of Mrs. Paine. The defendant, a colored man, thirty-eight years of age, called at the house of Mrs. Paine and saw the girl there. From the testimony of Bertha Buck, it is apparent that he held a conversation with Mrs. Paine relative to inducing Bertha to have intercourse with him. Bertha testified that as soon as he left the house Mrs. Paine commenced advising and attempting to persuade her to have intercourse with the defendant; that two days later the defendant again called at the house of Mrs. Paine; that she again advised and requested Bertha to submit herself to the defendant; that the defendant joined in the request and promised to give her a present on the following day. There is testimony that the girl did not wish to comply with the wishes of Mrs. Paine and the defendant. The girl testified that she finally consented and went into an adjoining room and had intercourse with the defendant. A few days later the defendant was arrested in the same house. The defendant admitted to the police that he had intercourse with the girl and stated that she was "good hitting." There was testimony that the defendant lived with two white girls for a time until they were arrested and sentenced to the State Workhouse and House of Correction. The defendant admitted that he lived in the same tenement with said girls. There was testimony that the defendant habitually resorted to houses of ill-fame and resorts where intoxicating liquors could be obtained; that he was frequently intoxicated and did very little work.

The defendant's counsel moved for a direction of a verdict and argued that

there was no evidence against the defendant except evidence of a single act of fornication. It was not error to deny the motion. In addition to the revolting picture of a colored man and woman, each of mature age, together attempting to persuade and finally by the promise of a gift inducing a little girl to submit herself to defendant, there was strong uncontradicted evidence which tended to show that the defendant was in speech and behavior the kind of a person which the complaint charged him with being.

The defendant excepted to the refusal to charge, as follows: "The fact that this defendant committed one act of sexual intercourse with Bertha Buck is not sufficient to warrant a conviction on the charge of being a lewd, wanton and lascivious person." The court charged in substance that a single act of fornication in secret by persons of mature mind did not cause either of the parties to be lewd, wanton and lascivious. The undisputed testimony was not confined to showing an act of illicit intercourse which was between a man of mature years and a little girl under the circumstances and conditions above related. The defendant admitted making vulgar statements in the police station relative to the little girl. He admitted living in the same tenement with two white girls until they were taken from the tenement and sentenced to the State Workhouse and House of Correction. He did not deny that he habitually frequented houses of ill-fame. The defendant took advantage of a little girl under circumstances above related and had intercourse with her. This fact and the facts which were undisputed are sufficient to warrant the jury in believing that the defendant was a lewd, wanton and lascivious person in speech and behavior. The defendant's request to charge would have had a tendency to mislead the jury. Taken literally it amounted to a request for a direction of a verdict. The court had already charged the jury correctly concerning the question involved in the defendant's request. The denial of defendant's request to charge was not

error.

We find no merit in the other exceptions to the refusal to charge. The exception to the admission of testimony is without merit.

All of the defendant's exceptions are overruled and the case is remitted to the Superior Court for sentence.

For the State: C. R. Makepeace.

For Defendant: M. J. Turano and Clarence Roche.

SUPREME COURT

Oriette Lowe
vs.
Charles E. Angell et al. } Eq. No. 546

OPINION.

(Before Tanner, P. J., Below)

RATHBUN, J. This is a bill in equity brought against Charles E. Angell and the Industrial Trust Company. The case is before this court on an appeal from a decree of the Superior Court. Said decree embodies findings made by the Presiding Justice of said court and decrees that the two deposits, described in the bill of complaint, standing in the name of Alpha B. Salisbury in the Industrial Trust Company on participation account belong to the complainant, Oriette Lowe, by gift causa mortis from Alpha B. Salisbury and directs said Industrial Trust Company and Charles E. Angell, administrator, to pay said deposits with the accrued interest thereon to said Oriette Lowe after the payment from said deposits of any debts or charges of the estate of said Alpha B. Salisbury legally chargeable against said fund.

It is admitted that said Salisbury signed orders (which are referred to by some of the witnesses as "checks") addressed to said Trust Company directing the payment of said deposits to the com-

plainant. Each of the orders bears the date of February 3, 1921. The signature on each order was witnessed by Frank A. Wender, whom at the time of witnessing, was employed as a nurse for said Salisbury. On either February 5th or 6th, 1921, Salisbury asked Wender, in the presence of the complainant, to witness his signature to said orders. Wender testified that he witnessed said signatures on February 6, 1921. The complainant testified that the signatures were witnessed on February 5th, 1921; that while she was visiting Salisbury on said date he said, "While I think of it, open that drawer in my dresser. I have made out a check for my bank book payable to you with interest"; that she opened the drawer and passed the books to him; that he handed them back to her and said, "I am going to give these to you"; that the signed orders dropped from the books when he opened them. She testified, "I put them back in the drawer * * * Mr. Wender had brought in the broth Mr. Salisbury was going to have, and he wanted me to feed him. I put them back in the drawer and left them there that night, I had other bundles to carry when I left the house. * * * The next day, Sunday I was there; he spoke about the books again. He said, 'I am going to give you these books because I want you to have them. You may need it. You are not working steady. You are down here spending a lot of your time, I want you to have them.' I took them home that night." Wender testified that he saw Salisbury give the bank books to the complainant and heard him say that he wanted her to have the money to use in taking care of herself.

On February 15th, 1921, Salisbury was very ill and was taken from his house to the home of Respondent Angell, where he died within a few days. Just before Salisbury was taken from his house he

asked the complainant to take the box, in which he was accustomed to keep his bank books and valuable papers, and take care of the box and contents.

Respondent Angell was appointed administrator of the estate of Salisbury and said box was delivered to Angell. Some time after his appointment Angell obtained from the complainant the orders and bank books in question and inventoried said deposits as a part of said Salisbury's estate.

The complainant contends that Respondent Angell promised, when she delivered said bank books and orders to him, to have said deposits transferred to her on the books of said Trust Company. Her testimony to this effect was corroborated by the testimony of her brother. Respondent denies that he promised as the complainant contends but admits that before he obtained the orders he told her that he would take them "down and put it up to the court and that he never brought the matter to the attention of the Probate Court. He testified: "Did you take the bank books back? A.—No; just the checks. I returned them to Miss Lowe and advised her to make them out as a bill and make the bill against the estate."

The respondent contends that Salisbury never made a gift of the bank books to the complainant; that Salisbury intended to give said bank books to her, not for her own use but to hold the deposits as a trust fund to be used by her in supporting his father in the event of said Salisbury's father surviving him; that said orders, although signed, were not delivered to the complainant until February 15th, 1921; that on said date said bank books and orders were in Salisbury's possession in the box where he kept his papers and that the complainant obtained said bank books and orders on said date when she, at the request of said Salisbury, took said box and con-

tents for safe keeping, and that on said 15th day of February Salisbury was, owing to disease, mentally incompetent to make a gift. Salisbury's father deceased February 6th, 1921, in the lifetime of said Salisbury and it is suggested that even although a conditional gift in trust was consummated the trust failed with the condition. Respondent Angell relies chiefly upon his own testimony and the testimony of his wife to support his contention that Salisbury never consummated the gift and only intended to make a conditional gift in trust. Angell testified that on February 6th, 1921, the complainant made certain statements in the presence of himself and his wife. He testified as follows: "Well, I can't say just what time of day it was; after his father's body was removed we were in the kitchen, that is right out of the sick room, Miss Lowe, my wife and myself. Mr. Wender had gone to the city for a change of clothing, and during the conversation Miss Lowe says: 'The other day Al called me in and said: "Etta, our bank books are in that box or drawer," I wouldn't say which, "and I have made out a check payable to you. If anything happens to me I want you to promise that you will look out for my father as long as he lives," and she said: 'I promised.' She said: 'I don't know the amount of the checks or check; I haven't looked at them.'" Mrs. Angell's testimony as to what complainant said on February 6, 1921, while tending to some extent to corroborate her husband's testimony, contradicts his testimony on some of the important details. The complainant denied making the statement attributed to her. The evidence warrants a finding that at the time the gift is alleged to have been made Salisbury and the complainant were, and had been for several years, engaged to be married. He relied much upon her advice and she had assisted him in his business. Nothing

has been suggested to indicate that a gift of the bank books by Salisbury to the complainant would be unnatural or unreasonable conduct on his part.

Whether Salisbury on either February 5th or 6th, 1921, intended to make an absolute gift of the bank books to the complainant and consummated his intention by delivering the bank books to her was a question of fact. This court has frequently said that the findings of fact made by a justice of the Superior Court sitting without a jury will not be disturbed unless such findings are clearly wrong. The trial justice found that on February 6th, 1921, said Salisbury made a gift *causa mortis* to the complainant of the bank books in question and that said deposits represented by said bank books are the property of the complainant. His findings are warranted by the evidence.

The respondent's appeal is dismissed. The decree appealed from is affirmed and the cause is remanded to the Superior Court for further proceedings.

For Complainant: J. H. Coen.

For Respondent: D. H. Morrissey.

SUPREME COURT

Angelo Grande	} Ex. &c.
vs.	
The Eagle Brewing Co.	} No. 5547.
(Before Brown, J., Below)	

OPINION.

RATHBUN, J. This is an action in assumpsit to recover money paid by the plaintiff to the defendant for intoxicating liquors sold by the defendant, who at the time held a wholesale and retail liquor license, to the plaintiff, an unlicensed dealer in intoxicating liquors, for resale. The justice presiding at the trial in the Superior Court directed a verdict for the

plaintiff for \$901.19. The case is before this court on the defendant's exception to the direction of a verdict.

The defendant was a holder of a wholesale and retail liquor license granted in accordance with the provisions of Chapter 123, G. L. 1909. It is alleged that the defendants in selling said liquors violated the provisions of Section 7 of said Chapter, which section is as follows: "No person holding a license under the provisions of this chapter shall sell any of the liquors enumerated in this chapter to any unlicensed dealer in intoxicating liquors, nor to any owner or keeper of any house of ill-fame, having reason to believe that the same are to be resold; and every person holding a license found guilty of violating the provisions of this section shall be fined one hundred dollars and imprisoned thirty days, and shall thereby be disqualified for holding a license of any kind under the provisions of this chapter for a period of five years." Section 60 of said chapter provides as follows: "All payments or compensation for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties to such sale, to have been received in violation of law, without consideration and against equity and good conscience."

The parties agreed as to the amount of money which the plaintiff had paid the defendant in compensation for intoxicating liquors. The defendant knew that the plaintiff was an unlicensed dealer and that the liquors were purchased for the purpose of resale in violation of law. On December 20th, 1916, the parties entered into a contract whereby the defendant agreed to sell and the plaintiff agreed to buy a retail liquor saloon, located at No. 257 Wickenden street, in the city of Providence, including the personal property located in said saloon and a retail liquor license granted

of four thousand dollars, to be paid as follows: One hundred (100) dollars, on the signing of these presents; four hundred (400) dollars at the time the license is transferred to said party of the second part and the said party of the second part will give to the party of the first part a personal property mortgage upon the saloon, contents and present and future licenses, said mortgage to be for the sum of thirty-five hundred (3500) dollars, without interest." Upon the signing of the contract the plaintiff paid one hundred dollars to the defendant as required by the terms of the agreement, entered into possession of said saloon and for several months thereafter conducted therein a retail liquor business. The defendant applied to the Board of Police Commissioners for a transfer of said license to the plaintiff. On February 6th, 1917, said board voted to transfer said license to the plaintiff but the plaintiff never signed the bond required by statute or had his surties approved by said board and the license was never transferred. The plaintiff conducted said saloon from December 20th, 1916, to May 17th, 1917, when he abandoned the saloon without completing his said contract with the defendant. During the time the plaintiff was in possession of the saloon he purchased from the defendant the liquors which he sold in the saloon. The monies which he paid to the defendant for said liquors he is attempting by this suit to recover.

The defendant pleaded the general issue and also in set-off and contends as follows: 1. That the defendant is entitled to a set-off to the extent of four hundred dollars, the amount which by the terms of said agreement was to become due the defendant from the plaintiff when the license should be transferred. 2. That after February 6th, 1917, the date on which said board voted to transfer said license to the plaintiff, the plaintiff was

not an unlicensed dealer and that the plaintiff can not recover any sums of money which he paid to the defendant for liquors after said date. 3. That the plaintiff is asking to recover a penalty imposed by said Section 60 for the violation of the provisions of Section 7 of said chapter; that an act of Congress, known as the Volstead act, by implication and Chapter 2231 of the Public Laws of 1922, in expressed terms has repealed said Sections 7 and 60 and thereby deprived the plaintiff of any right which he may have had to maintain this action.

The defendant argues that inasmuch as it did all things which the defendant was required by the terms of said contract to do and that the plaintiff prevented the transfer of said license by his neglect and refusal to produce his sureties for approval and to file the bond required by statute as a condition precedent to the transferring of said license, the plaintiff should not be permitted to take advantage of his own wrong by urging that because the license, the plaintiff should not be per-hundred dollar payment provided for in said contract has not become due. The contention would not appear to be entirely without merit were it not for the fact that the parties by the terms of said contract stipulated what the liquidated damages should be in the event of a failure on the part of the plaintiff to complete the agreement. Said contract contained a clause as follows: "In case said Angelo Grande refuses to wholly perform this agreement, except for reasons aforesaid, said money paid on account of the purchase price shall be retained by said Eagle Brewing Company as liquidated damages."

The rule is stated in 8 R. C. L., Sec. 127, at p. 578, as follows: "If a provision is construed to be one for liquidated damages the amount named forms, in general, the measure of damages in case of

a breach, and the recovery must be for that amount. No other or greater damages can be awarded, even though the actual loss may be greater or less."

Did the plaintiff on February 6th, 1921, become a licensed dealer by virtue of the vote of said board to transfer said license to him? This question must be answered in the negative. The plaintiff did not file a bond as required by statute. No license was issued to him and no license could have been issued to him before he filed a bond. Section 2 of said chapter contains a provision as follows: "Before any license shall be issued under the provisions of this chapter, the person applying therefor shall give bond to the city or town treasurer in the penal sum of one thousand dollars, with at least two sureties satisfactory to said council or board." The vote of said board would have been no protection to him had he been prosecuted for selling intoxicating liquors. 23 Cyc. 120. See *State vs. Conley*, 22 R. I. 403.

We are of the opinion that the plaintiff is not seeking to recover, as the defendant contends, a penalty provided in Section 60 of said Chapter 123, and it is therefore unimportant whether said Chapter 2231 or said Volstead act (both of which were passed after the rights of the parties to this action became fixed) repealed any of the provisions of said Chapter 123. Said Section 60 provided that: "All payments or compensation for liquors sold in violation of law, whether in money, labor or personal property, shall be held and considered, as between the parties to such sale, to have been received in violation of law without consideration and against equity and good conscience."

It was suggested that if said Section 60 has been repealed the parties are now in *pari delicto*. The plaintiff after the purchase of liquors from the defendant may have violated the provisions of said

chapter by selling and keeping said liquors for sale but the parties were not in *pari delicto* in making the sale and purchase of the said liquors. It was unlawful for the defendant to sell, but the statute did not forbid the plaintiff to buy. A repeal of the statute could not either supply a consideration where none existed or render criminal an act of the plaintiff which was not prohibited when done. The plaintiff paid money to the defendant which was received without consideration. The plaintiff at the time he paid the money had an action, not under the statute but at common law, to recover back the money because it was received without consideration. *McGuinness vs. Bligh*, 11 R. I. 94; *Gorman vs. Keough*, 22 R. I. 50. Although the legislature in passing said Section 60 recognized the existence of the common law right to recover back money which had been paid without consideration, and section gave no new right of action but simply declared that money paid for liquors to be sold in violation of law is received without consideration. Assuming that said sections are repealed, the repeal did not take away the common law action to recover money paid without consideration. The plaintiff does not need the statute except for the purpose of determining what his rights were when he paid the money. See *Coggeshall vs. Groves*, 16 R. I. 18. *Peters vs. Goulden*, 27 Mich 171.

The defendant's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment on the verdict as directed by the court.

For Plaintiff: John L. Curran.

For Defendant: John H. Slattery.



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Vol. 2.

SUBSCRIPTION PRICE, \$15 A YEAR

No. 41

JULY 21, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION.**

**Address All Communications to the R. I. Law Record, 518 Howard Building
Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Post Office at Providence, R. I., Under the Act of March 3, 1879.

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Index of Superior Court

Rescripts in Volume II

Rhode Island Law Record

AD DAMNUM

Motion to amend declaration in
this regard after verdict denied. 363

ADMINISTRATOR'S FEE

Jury's verdict upheld 218

ADULTERY

Charge in divorce sustained by
proof of false registration of
birth of child of another woman.. 53

ATTORNEY AND CLIENT

Rights of both defined under stat-
ute in case of charges of fraud
and duress in settlement by cli-
ent directly with defendant.
Demurrer overruled... 193, also.. 10

Bill for partition of real estate.
Court sustains decision of arbi-
trator 536

BONUS STOCK

Refusal to cancel same..... 392

CONTRACTS

Construction of agreement re-
lating to the giving of informa-
tion by employee..... 592

COMPENSATION OF COUNSEL

Allowed to be paid out of trust
fund 416

CRIMINAL LAW

New trial denied though juror's
sacrifice of opinion at behest of
court advanced as one ground.. 330

DAMAGES

Held excessive in case where de-
fendant was found guilty of
careless and unskilled treat-

ment 297-298

Also in accident in apartment
house case 328

DEED

Where instruments drawn fail to
express the intention of parties
through a mistake of law re-
formation will be given..... 135

DEMURRER

Prior action held so defective as
to be ineffectual and demurrer
to plea in abatement sustained.. 324

Sustained in action for breach of
covenant to convey land be-
cause of uncertainty in descrip-
tion of land 143-237

Overruled and description of land
in declaration in trespass quare
clausum fregit held sufficient.. 322

DIVORCE

Certain abusive statements, oral
and written, concerning petition-
er's family held to support
charge of extreme cruelty..... 53

Extreme cruelty held not sub-
stantiated 420

Adultery charge sustained by
proof of false registration of
birth of child of another woman 53

DOWER

Is computed upon the full value
of estate charged exclusive of
mortgages 348

Husband having held only estate
for life, no dower for second
wife 395

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DUPLICITOUS

Not duplicitous to allege single breach of each of several different promises or warranties in a single contract. Demurrer overruled 314

EQUITABLE LIEN

The test of validity of such a lien in this state is not whether a lien is secret or known: Equitable lien held to depend on the maxim "Equity regards as done that which ought to be done".. 294

EASTONS BEACH

Newport's right to lease upheld.. 410

INSURANCE

Demurrer overruled in case where plaintiff in his declaration alleged that he had always performed, fulfilled and kept all the things on his part according to

the tenor and effect of the insurance policy sued on and had sustained injuries entitling him to payments in the amount set forth in the declaration..... 220

JITNEY BOND

Demurrer to declaration sustained as bond sued on was given to the City of Providence and accident occurred in Cranston.... 329

JURY

Verdict of, when entirely unsatisfactory and failing to do justice, is set aside 92

MALICIOUS ABUSE OF PROCESS

Count held without merit and demurrer sustained 377

MALICIOUS PROSECUTION

Where defendant had been convicted of perjury the trial justice

allowed the jury's verdict in favor of the plaintiff to stand although otherwise there would be much doubt in the mind of the court that the plaintiff had sustained the burden of proof.... 192

MEDICAL TESTIMONY

As affecting the burden of proof on the part of the petitioner for relief to show he was injured during the course of his employment10-141

MECHANICS' LIEN

Ownership within intent of the lien law 246

Separate buildings, separate liens 592

Motion to dismiss petition, because of failure to state amount of money for which the lien was claimed and because petition did not describe the material and labor furnished, so that the same could be identified, denied..... 193

MORTGAGEE

Held entitled to payment of his mortgage though same made within four of assignment for benefit of creditors 391

MORTGAGES

Questions arising under construction mortgages considered..... 279

NEGLIGENCE

Motion to dismiss action brought against party alleged to have caused injury and the party insuring him against liability, such action having been brought and pending when Chapter 2094 of Public Laws was passed, at the January session, 1915, providing the insurer and insured should not be sued jointly, denied 121-201

NEW TRIALS

Plaintiff's petition granted as it appeared to the court that plaintiff had been in the exercise of due and reasonable care 282

Held that where the testimony showed that plaintiff relied on the guidance of her husband in crossing a wide street where traffic was heavy and husband relied on a look given by him when he left curbing, a new trial must be granted 23

Where negligence of driver contributed to the accident and such negligence was not attributable to the plaintiff, a passenger in an automobile, new trial granted 73

PICKETING

Preliminary injunction against all picketing 490

PLEADING

Where plaintiff's additional plea in bar set up a condition precedent held that there was no reason or logic why defense could not be urged in bar as well as in abatement 64

RIGHT OF WAY FOR VEHICLES

Chapter 1778, Public Laws (approved April 24, 1919), construed and applied 281

Also Chapter 1028, Section 1, of the Public Laws relating to lights on vehicles 346

SALE OF REAL ESTATE

For better investment 364

"SEPARATE AND APART"

In statute is construed 9

SERVICE OF PROCESS

And revocation of agency 534

SURPLUSAGE

Defined and held not to render a
pleading subject to demurrer... 97

TAXES

Buildings that by intent of parties and by constructive or actual severance were personal property held improperly assessed as real estate117-324

TENANCY

Breach of terms and landlord's rights as affected by waiver... 217

VERDICT

Amount awarded for pain and suffering held excessive 380

VERDICT OF JURY

Set aside, testimony of jewelry experts conflicting therewith... 477

VERMINOUS CONDITION

Of house held not to justify a lessee in abandoning leased premises 120

WORKMEN'S COMPENSATION

Held no evidence adduced that an injury resulted from an accident in course of employment..... 141

Wife held sole beneficiary and as she had elected to sue, and did recover, damages from third party for husband's death, claims of other relatives against employer invalid

Wife living separate and apart from husband for justifiable cause held solely dependent upon him under provisions of act.... 429

Table of Cases

Superior Rescripts in Volume II

Rhode Island Law Record

Alsace Worsted Mills vs. Adams Express Co. 534

Anderson, John M., vs. Adolf E. Johnson, et al 392

Applebaum, Max vs. Merchant's Tailors' Trimming House 363

Arnold, Mary J. vs. Margaret M. Barrington 64

Beck, Isaac vs. Leo R. Boudron.... 346

Bell, George S. vs. Alexander Weiner, et al 120

Borda, Wenceslas vs. Avice Weed Borda 53

Bowden, Alice B. vs. William T. Ide. 536

Brennan, John P. vs. John R. White & Son, Inc. 7

Brennan, John P. vs. John R. White & Son, Inc 193

Campbell, Florence E. H., appt., vs. Herbert L. Carpenter, Admr. c. t. a., Appellee 218

Carlson, Alfred, et al, vs. United Railway Signal Co., et al 201

Cascanbas, Apostolos B. vs. Receivers of Rhode Island Company... 328

Cascanbas, Apostolos B. vs. The City of Newport, et al 410

Ciaccia, Maria Felicia vs. General Fire Extinguisher Company	314	Grant, Elizabeth C. vs. James S. Grant	16
City of Providence for the Benefit of Pierre Michaud vs. Victor Law- rence, et al	329	Hamel, Arthur, Admr., vs. Philip Brouillard	323
Congdon, Jennie F. vs. Louis H. Block	23	Hanson, Charles vs. Grant Pierce..	392
Contrexville Mfg. Co. vs. Oswegat- chie Textile Co.	294	Haynes, Martha E. vs. Albert S. Greene	37
Same vs. Same	395	Same vs. Same	377
Corria, Adelina, et al vs. Fink Bros.	464	Hunter, William vs. Gorham Mfg. Co.	10
Deneault, Matilda vs. Arthur Dene- ault	420	Ilczysz, Victor vs. Jacob Mosteck. 238	
D'Errico, Carmine vs. Emogene Ewald	92	Imperial Wet Wash Laundry vs. Mi- chael Antonelli	592
De Wolf, J. W. vs. Pasquale De Petre	282	In re Estate of Robert Forsyth	364
Drowne, Alice vs. Nicola Siravo.....	73	Innan, Diadama F. vs. Gilbert S. Innan, et als	393
Edwards, Alfred vs. Builders Iron Foundry	141	Jones, Arthur vs. John F. Jacobson..	217
Farber Cornice Co. vs. Catherine Wolk, et al	278	Kimball, Emma H. vs. Massachusetts Accident Company	36
Fink, Samuel vs. Samuel Neuberger	120	Kitchen, Daniel vs. Leon Rosenfield.	192
French, Eliabeth L. vs. Metacom Spinning Co.	64	Lagace, Joseph G. vs. Balisle Bros..	281
Frigault, Albert A. vs. Catherine Wolk, et al	278	Lansing Lumber Co. vs. Catherine Wolk, et al	278
Gallagher & Mooney vs. Catherine Wolk, et al	278	Lawrence, Victor, et al vs. City of Providence for the Benefit of Pierre Michaud	329
General Motors Truck Co. vs. Shep- ard Company	314	Loiselle, Wiliam, et al vs. Pawtucket Ice Co.	464
Gianfrido, Angela Dimouro, Alias, vs. Mrs. John Roiso	331	Massachusetts Accident Co. ads. Emma H. Kimball	36
Graham, Susan H., Executrix, vs. Walter C. Nye, et al.....	327	Maxwell, Hazen vs. Alexander Wei- ner, et al	120
		McLaughlin, Belle S. vs. James Mc- Laughlin	381

Morrell, Frank vs. Alphonsine J. Londe, et al	297	Shepard Company vs. General Motors Truck Co.	314
Morrell, Mary vs. Alphonsine J. Londe, et al	298	Simmons, Nancy vs. J. Samuels & Bro., Inc	429
Mosteck, Jacob vs. Victor Ilezysz 238		Simmons, Elizabeth vs. J. Samuels & Bro., Inc	429
Mortwinian, Paul vs. William C. Tonet, et al	143-237	State vs. Lucinda Scott	330
Mozealous, James A. vs. Gilbert Moni 592		Stevens, Frank K. vs. Claire F. Stevens	313-593
Najarian, Joseph, in re assignment of	381	Stewart, George T. vs. May F. Stewart	9
Nickerson, Minnie B. vs. Amber I. Remington, Admx.	348	Sullivan, Arthur A. vs. Wallace Bradic and Rose Bradic	193
New Haven Iron & Steel Co. vs. Walter J. Westlake, Collector of Taxes	117	Sweet, Asa vs. Etta Hoxsie	322
Same vs. Same	324	Taylor, Frank O. vs. Commercial Casualty Insurance Co.	220
Packard, Charles A. vs. Catherine Wolf, et al	278	Tortis, Giuseppina vs. Marco Colagiovanni, et al	418
Parks Brothers & Rogers, Inc., vs. Joseph E. Miller, Inc.	235	Warwick, Town of vs. Patrick A. Smith, et al	382
Pennington, Joseph vs. John D. Glover, et al	130	Welsh & McGreen vs. Catherine Wolk, et al	278
Petrucchi, Frank vs. The New York, New Haven and Hartford Railroad Company	379	Wolk, Catherine vs. Jacob Yablonsky 278	
Pierce, Grant vs. James F. Donovan 392		Wolk, Catherine vs. Lansing Lumberber Co.	278
Same vs. Charles Hanson	392	Wolk, Catherine vs. Farber Cornice Co.	278
Quinn, John et al vs. John Drummond et al	134	Wolk, Catherine vs. Albert A. Frigault	278
Reynolds, Peter vs. Blackstone Valley Gas and Electric Co.	148	Wolk, Catherine vs. Charles A. Packard	278
R. I. Hospital Trust Co., Trustees, vs. Maria Bowen Chapin, Ex'x. et als 416		Wolk, Catherine vs. Gallagher & Mooney	278
Rosso, Mrs. John vs. Angela Dimauro Gianfrido, alias	331	Yeblansky, Jacob vs. Catherine Wolk	278
Sankey, Hilda vs. Pawtucket Amusement Co.	536	Yuseff, Mahmod vs. Karekin Berberian	276

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Rhode Island Law Record

Vol. 2

SUBSCRIPTION PRICE, \$15 A YEAR

No. 42

SEPTEMBER 29, 1922

PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION

Address All Communications to the Rhode Island Law Record, 518
Howard Building, Providence, R. I.

Entered as Second Class Matter May 27, 1921, at the Postoffice at Providence, R. I., Under the Act of March 3, 1879.

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Jury Trial Calendar

MONDAY, OCTOBER 2, 1922

52200 J H Coen	Allie J. Zura vs Joseph Blazar et al.	R & R
53209 G E & C	Giovanni S. Morelli vs Nicandro Ricci	P & DeP
50398 Ziegler-K	Jane Redfern vs Richard Rosa	A R
51245 G M & H	Lizzie H. Davis vs United R'y Signal Co.	C & Hart
52683 C & C	Mort. O. Freeman vs Walter L. Clarke, C.T.	E C S
49936 C C & McC	John Chatterton vs Thomas Scholes, et al.	F & H

TUESDAY, OCTOBER 3, 1922

52087 M C & C	Philip S. Lenz, p. a. vs Harriet Lund	R T B
52088 M C & C	William A. Lenz vs Harriet Lund	R T B
51881 F & H	Elizabeth Burrows vs Paul Zuckerberg	W A G
51882 F & H	Etta M. Steere vs Paul Zuckerberg	W A G
52362 F J O'B	Mary C. Weist vs F. W. Woolworth Co.	Q & K
52363 F J O'B	Charles C. Weist vs. F. W. Woolworth Co.	Q & K
51457 C & C	M. A. Shields, et al. vs United R'y S. Co.	C & H
M.P.455 C & B	James E. Battey et ux vs City of Providence	Chace
53157 C R E	Charles N. Fisher, Jr. vs F. G. C. Fish	S K & S
46413 W H McS	Nicola Carrier vs Bennie Cufelzia	J E D
51404 P & DeP	Frank Tarentino, p. a. vs Harry Collins	L V J
53484 C E R	Paul W. Brown vs Joseph S. Ryan	E H McC

WEDNESDAY, OCTOBER 4, 1922

45662 F & H	Emma R. Southey vs Walter L. Clark, C. T.	E S C
42820 B & C	Herbert I. Mattewson vs. Fanny Eisenberg	
42810 C & C	Fanny Eisenberg vs Herbert I. Mattewson	B & C
P.A.818 C M B & L	Elwood J. Fisher vs. Clif R. Clapp	E & A
44166 Cooney & C	Bagledasar Semonian vs James Panoras	H A C
50085 W H McS	George S. Bell vs Alexander Weiner et al.	H E & M
49519 Cooney & C	John F. Nelson vs Charles Wells	J F H
49656 L & McD	Julian Ruduicki vs Union Liberty Co.	

THURSDAY, OCTOBER 5, 1922

51420 McK & B	Charles Miller vs Charles T. Smith Co.	R T B
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63 WESTMINSTER STREET

50004 McG & S	William Lynch vs John F. Neilan	G F T
53154 H E & M	Giant Stor. Bat. Co. vs Walter D. Easterhood	C Z A
P.A.815 H E & M	Clara Allard vs Emma B. Louth	D & D
46489 J B L	City of Providence vs Louis George	P & DeP
49221 R & R-A	Joseph Chernov vs Alexander C. Brown	Q & K
53465 C & Cooney	George A. Joslin vs Elbredge A. Rhodes	J H R
53698 J H R	Elbredge A. Rhodes vs. George A. Joslin	C & C
51909 J W G	Ernest H. Stephenson vs. Martin Leo Kiernon	
53485 C E R	Ann H. Goff vs Andrew E. McGowan	T J D

FRIDAY, OCTOBER 6, 1922

52686 J H C	Anna Carroccia vs Felix Carroccio	E M S
49029 H E & M	Harley S. Place vs H. E. Walling	J J R
52966 W A H	Harve Frechette vs Resnik Parlor Furn. Co.	P & S
52337 C R E	Hamilton W. Cady vs Alice Case	W S F
52184 C R E	Edith W. Cody vs Alice Case	W S F
52505 R G E H	Thomas E. Camp vs Peter Kaloostian	J W G
47955 C & H	William M. Walsh vs Edward J. Casey	J C C

53461 P & DeP	Gilberto Moni vs N. Y., N. H. & H. R. R.	
M.P.483 J H	F. J. Esleeck et al. vs. City of Providence	E S C

MONDAY, OCTOBER 9, 1922

48595 F & H	Lena C. Newman vs Sarah Wilson	W S Jack
48597 F & H	John H. B. Newman vs Sarah Wilson	W S Jack
51169 T L C	H. W. Bowker, Admr. vs F. H. Swan et als	G F F W
53262 H E & M	Cadillac Auto. Co. R. I. vs John D. Ellis	H E & M
39888 J J McC	A. H. Burns, Sr., et al. vs W. Brightman et al.	W & G
51998 O'S & C	George B. Syverson vs Warren A. Martin	E R W
P.A.813 Bromson-N	Charles W. Cassidy et al. vs B. McDonald, Exc.	Gillrain
50988 S-M-B	D. Strauss Co., Inc. vs Merch. Tailors, T. H.	B & B

TUESDAY, OCTOBER 10, 1922

51473 G W B	Benj. St. Laurent vs Martin Lippman	C Z A
49031 B & B	Seaboard Flour Co. vs D. DiLuglio	P & DeP
52474 C & C	Isola Tetreault vs Philip Berman	S M B & L
52475 C & C	Phileas Tetreault vs Philip Berman	C M B & L
53436 Z-K	Nora Hassett vs United Elec. Reg. Co.	Whipple
M.P.460 C M B & L	Charles C. Hall et al. vs City of Providence	Eklund
53426 Benedetto	Benedetto Bucci vs Walter E. Bossa et al	H & S
53498 J W G	Jonathan Andrews et al. vs Robert Pokrass	
52206 C A K	Lucy Guiulbult vs Mike Menzoian	C M B & L

WEDNESDAY, OCTOBER 11, 1922

53261 H E & M	Cadillac Auto Co. R. I. vs Arthur W. Wunsch	P & DeP
37212 J J McC	Mary Feeley vs William Brightman	W & G
35634 C & C	Frank Joseph vs Henry Lippitt	G P & T-P & T
35635 C & C	Flora Joseph vs Henry Lippitt	G P & T-P & T
52549 R & R	Irv ng Fain vs Jenckes Paper Box Co.	P & S
52551 R & R-A	Archie Fain, p. a. vs Jenckes Paper Box Co.	P & S
52556 R & R-A	Sarah Fain vs Jenckes Paper Box Co.	P & S
53414 B & S	Edward D. Williams vs Richardson & Clark	Com & Can
51038 W R P	William McLean vs Frank C. Pettis	F & H
52561 Com-Can	Walter H. Jackson Co. vs A. G. Gardiner	H E & M

THURSDAY, OCTOBER 12, 1922

COLUMBUS DAY—LEGAL HOLIDAY

FRIDAY, OCTOBER 13, 1922

47352 W S F	Gertrude I. Landry vs Bernier & Robidoux	C & B-J W S
48540 McK & B	Wallace E. Wilcox vs Frank H. Swan et al.	Whipple-S
48541 McK & B	David P. Morris vs Frank H. Swan et al.	Whipple-S
50171 H E & M	Donald Mackey vs Dimond Company	P C J-M
51626 Stiness-M	Clifford G. King vs Arthur I. Clark	C & B
45221 F & H	Harold Hitchcock vs William H. Cooney	Cooney & C

District Court Appeals

MONDAY, OCTOBER 2, 1922.

50034 E P B A	Gulf Refining Co. vs John T. Goggin, Appt.	C & Cooney
51020 Remington	Marion G. Dwight vs Mary A. Moan et al., Ap.	McSoley
49261 LeCount	Myers R. Armstrong vs Adolphus Rotenberg	R & R
52292 G K & G	W.B.S. Whaley, Jr., Ap., vs W. P. Hamblin, Inc.	G E & C
51381 S-M-B	J. Thompson & Co. vs. L. W. Bishop & Co. Ap.	J E B
49495 S-M-B	Cayuga L.&C. Mills vs Eastern Broom Co., Ap.	W & O
52231 S-M-B	John Wanamaker, Ap. vs Arthur V. Sweeney	D E G
51059 S-M-B	Alex. Hamilton Inst. vs John D. Ellis, Ap.	I M
46154 C R Easton	Antonio Strongoli, Ap. vs Rev. R. I. Co.	Kiernan

TUESDAY, OCTOBER 3, 1922

47353 T F Vance	Evangeline DeRoza, Ap. vs Lewis A. Cain	J B L
47536 J B L	Lewis A. Cain vs. Evangeline DeRoza	Vance
53052 T M O'R	Harry Boluch vs Raymond G. Welch	J H McG
50029 M & T	Am. National Co. vs People's Furniture Co.	J F Conaty
51605 S-T-B	Starkweather & Shepley vs L. M. Berman, Ap.	W R P
50317 S-T-B	Providence Paper Co. Ap. vs M. Lumbrano	G E & C
48378 L Semonoff	James Devine vs Sarah Salter	I S H
48138 L Semonoff	Isaac Saunders vs Sarah Salter	I S H
52047 A B West	Lawrence C. Walsh vs Frank G. White, Ap.	R T B
48900 S-M-B	American Electric Co. vs Millers, Inc.	Wildes
53351 J H McG	Corp Bros. vs I. Broomfield, Ap.	R & R
53451 W & G	Joseph E. Fosky, Ap. vs W. S. Williamson	W C & C

WEDNESDAY, OCTOBER 4, 1922

52805 McK & B	Giacomo Assanto, Ap. vs Rocco Croe	J A H
52995 S-M-B	George E. Keith Co., Ap. vs Inlaid Company	F H H
52791 L J Tuck	Stanley Suidiak vs Julia Kus	P E D.
51667 R & H	Felix DeGrange vs Earl G. Page, Ap.	C C & McC
53288 N W L	H. Littlefield, Inc., Ap. vs E. J. Maynard	R & R
53296 R & R	A. Kauffman & Son vs Morris Angber	J E Brown
52111 Stiness	C. Creators & Co., Ap. vs John Sklavournes	J F B
52701 Stiness	Outlet Company, Ap. vs. Arthur S. Lippack	C & Clason
51292 F & H	Prov. M. & H. Co. vs Wilfred Doran, Ap.	C J O'C
51293 F & H	Prov. M. & H. Co. vs. Sidney R. Gilmore, Ap.	C J O'C

THURSDAY, OCTOBER 5, 1922

54243 C & C	Dora Goldstein vs Charles Sarafeau, Ap.	R & R
49064 F & H	John F. McBurney vs John Tropino, Ap.	R & R
53041 S-M-B	S. C. S. Co., Ap. vs Watchemoket Ldry. Co.	C A W
51724 Stiness	Colum. Graphophone Co. Ap. vs. D. H. Slavitt	B & B
53340 Coen	Universal Auto Ex. vs Fred D. Briggs, Ap.	Grim
44932 R G E H	N. Sallinger vs Joseph Patriacca, Ap.	B C
52107 G A B	W. A. Huse & Son vs Young Orchard Co., Ap.	T & C
53458 Grim	Fred D. Briggs, Ap. vs Martin L. Kiernan	Coen
53815 F & H	Arthur Knott vs Arthur Howard, Ap.	T G D
50298 W R P	Pracentino Deconcilus vs Maria Guerriero	J L C

FRIDAY, OCTOBER 6, 1922

49496 W C & C	Harris L. Faley vs B. M. Manchester, J., Ap.	J J R
52620 A S & A	Bangor Cheese Corp. vs. Berman & Dressler, Ap.	J & M
53287 A & A	Gordon Hutchins vs Wesley C. Martin, Ap.	R & H
53114 Morrissey	Wilfred Monast, Ap. vs Vahan Ashodian	Rustigan
53228 J E B	S. G. Weisman vs Ahavath Sholom Synagogue	R & R
51087 B & B	Solomon Karn vs Harold B. Congdon, Ap.	W A G
51654 W H McS	Catherine McCaw, Ap. vs Shea Large	I H
53805 Stiness-M	B. & L Hdw. Co. vs Smith Bros M. S., Inc., Ap.	Heathman

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Vol. 2

SUBSCRIPTION PRICE, \$15 A YEAR

No. 43

OCTOBER 4, 1922

**PUBLISHED EVERY FRIDAY AFTERNOON EXCEPT DURING
COURT'S SUMMER VACATION**

**Address All Communications to the Rhode Island Law Record, 518
Howard Building, Providence, R. I.**

Entered as Second Class Matter May 27, 1921, at the Postoffice at Providence, R. I., Under the Act of March 3, 1879.

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SUPERIOR COURT

Imperial Wet Wash
Laundry
vs.
Michael Antonelli

} Eq. No. 5899

RESCRIPT

June 28, 1922

TANNER, P. J. This case is heard upon the petition for a preliminary injunction to prevent the respondent from working for another laundry as a laundryman in the shop. He had been employed as a solicitor, collector and deliveryman by the plaintiff.

Clause 5 of the contract between the parties reads: "That he will keep secret and not divulge to any person, firm or corporation, except by express order of his employers, names, addresses or any information concerning the customers of the said employers during said employment and for two years thereafter."

Clause 7 reads: "That said employee will not directly nor indirectly, either as principal, agent or servant, for the term of two years, after any termination of said contract, enter or engage in any branch of the laundry business in the designated territory without the written consent or approval of said employer. The Imperial Wet Wash Laundry, Providence, R. I."

It is claimed by the respondent that so far as the contract would prevent him from engaging in any department of the business other than that as a solicitor, collector or deliveryman, the contract is void as in restraint of trade.

We think the proper test of the validity of such contracts is as to whether or not they go to an extent that is not necessary for the protection of the employer. In this partic-

ular case the respondent had acted simply as a solicitor, collector and deliveryman. We do not feel that it is necessary to enjoin him from acting as inside workman in another laundry, since we do not believe that this is necessary to the protection of the plaintiff. We think it would be sufficient to enjoin him from giving any information as to the customers of the plaintiff or any trade secrets that he may know.

Leng & Co. vs. Andrews, I Chancery 763 (1909).

For Complainant: John M. Clifford.

For Respondent: Bennie Cianciarulo.

SUPERIOR COURT

Frances L. O'Rourke
vs.
Harry Loeb Jacobs,
Appt.

} Law No. 4927C

RESCRIPT

June 30, 1922

BAKER, J. This is an action of trespass on the case growing out of the head-on collision of two automobiles on Norwood avenue near the corner of Broad street in the city of Cranston.

The jury returned a verdict of \$275.90 for the plaintiff.

The motion for a new trial is filed on several grounds, but the only one urged is that the weight of the evidence showed that the plaintiff was guilty of contributory negligence.

The defendant contends that, according to the plaintiff's own testimony, the accident happened on Norwood avenue, about 75 feet from the corner of Broad street, and that the operator did not see the defendant's car until he was from five to ten feet from it, although he was looking ahead.

The lights of both cars were lit

and they were not proceeding very rapidly. The court, however, believes that the weight of the evidence showed that the accident happened somewhat nearer the corner of the two streets, possibly forty or fifty feet from the corner. The defendant came around the corner of Broad street into Norwood avenue, and there was a sharp conflict as to whether the parties were on their respective right sides of the road when the accident occurred. On this point the jury must have found in favor of the plaintiff, and there was sufficient evidence to support such a finding. In a case of this kind, where events happen rapidly, the court does not feel that definite distances, as testified to by witnesses, ought to given too great weight unless accurate measurements are made. At the best they are only the witnesses' estimates.

The issue of contributory negligence was submitted to the jury on the evidence, and the court believes that in this case this question was primarily one for the jury to determine. The evidence on this point showed a state of facts on which reasonable men might fairly differ; especially on the question as to when and how soon the plaintiff did see or should have seen the defendant's car.

The court finds on the whole that there is sufficient testimony to support the verdict and the motion for a new trial is denied.

For Plaintiff: Fitzgerald & Higgins.

For Defendant: R. T. Barnefield.

SUPERIOR COURT

J. Thomas Johnson }
vs. } Law No. 52359
Nathan Selengut }

RESCRIPT

June 30, 1922

BAKER, J. In this case, after a verdict of \$400, in favor of the plain-

tiff, the defendant has filed a motion for a new trial on several grounds.

The case grew out of the collision of two automobiles at the corner of Division and School streets in the city of Pawtucket.

The defendant's claim is that the so-called right of way statute applies to the case, and that the plaintiff did not "grant the right of way" to the defendant's automobile as it approached from the right, thereby becoming guilty of contributory negligence.

The testimony in the case was conflicting and raised a question for the jury. Each party claimed that the other ran into him. The corner was a partially blind corner. There was ample evidence to support a finding that the defendant was guilty of negligence. As to the question of contributory negligence, the great preponderance of the evidence showed that the plaintiff sounded his horn, was moving at a moderate speed, and was partially across the junction of the two streets when the collision occurred.

The testimony was conflicting on the question as to whether the vehicles reached the corner at approximately the same time, or whether the plaintiff's automobile got there sufficiently ahead of the defendant's to proceed across. This point was submitted to the jury to be considered by them in passing on the question of plaintiff's contributory negligence, and they were instructed as to the effect of the so-called right-of-way statute in this connection.

The jury found that the plaintiff was in the exercise of due care and the court believes, after seeing and hearing the witnesses, that on the question of liability the verdict is supported by the great weight of the testimony and is proper.

Under the fourth ground of his motion defendant also contends that the

amount of the damages awarded is excessive.

The court has considered this question carefully and has come to the conclusion that on the whole the amount of the verdict is somewhat large, and is not supported by a preponderance of the evidence. The only amount actually paid out by the plaintiff was \$5 for towing. The actual damage to the car on plaintiff's own testimony, including tire and generator chain, was estimated at about \$132. The rest of the verdict was made up of plaintiff's loss of business or estimated profits, he being a licensed hackney driver. The plaintiff has no right to leave his car unrepaired indefinitely and charge up loss of business to the defendant. The court believes that on the evidence the allowance of two weeks time for repairs is ample. The undisputed testimony was that the plaintiff was clearing \$100 a week in his business. This amount seems rather large to the court, but the plaintiff testified that he had certain regular customers, and the jury evidently believed it and took it into consideration in arriving at their verdict. Adding \$200, therefore, as loss of business during the time which it would take to repair the car, to the \$5 towing charge, and to the \$132 as actual damage to the car, makes a figure of \$337.

The court feels that this amount will more nearly give substantial justice to the parties than the amount of the verdict as returned by the jury. If, therefore, plaintiff within ten days from the filing hereof remits all of the verdict in excess of \$337, the defendant's motion for a new trial is denied, otherwise granted.

For Plaintiff: Joseph G. LeCount.

For Defendant: Ralph T. Barnefield.

SUPERIOR COURT

A. M. . Molter, et al., Ex'rs.	} Eq. No. 5265
vs.	
S. A. Singer & Co., et al.	

RESCRIPT

June 30, 1922

TANNER, P. J. This is a bill in equity brought to restrain the sheriff and Singer & Company from removing personal property from the State, said property having been garnished by said Molter in an action of assumpsit against Silverstein & Son. Said property was replevined from the garnishee by said Singer & Company, who claimed to have bought the goods from Silverstein & Son before garnisheeing. The complainant alleges that said transfer from Silverstein & Son to Singer & Company was fraudulent. Said Singer & Company is now insolvent and its property in the hands of a receiver.

The case is heard upon demurrer of the respondent, Singer & Company. The main ground of demurrer is that the complainant has an adequate remedy at law and that he can avail himself of the replevin bond, and that not having obtained judgment he can not maintain a bill in equity.

We do not think that there is an adequate remedy at law. The complainant is not a party to the replevin bond given by Singer & Company to the garnishee. We know of no right which the complainant would have to prosecute an action for recovery upon the replevin bond.

The respondents call our attention to the case of Finn vs. Mehrback, 65 N. Y. Supp. 250, where it was held that the bond furnished by a third party who claims the property attached in an action between A and B

is substituted for the attached property, but this is done under the provisions of Sec. 1375 of the Consolidated Act of New York that specifically requires that the bond should be given to the plaintiff in the attachment suit. The bond here does not run to the plaintiff in the attachment suit, but to the garnishee of the defendant in the replevin action.

Neither had the complainant any legal right to appear in the replevin action. He could only do so by grace of the garnishee so far as and so long as the garnishee sees fit to allow it. This is not an adequate remedy at law.

The rule that a complainant must have obtained a judgment in order to maintain a suit in equity to set aside a fraudulent transfer, which interferes with the prosecution of his suit and the satisfaction of his execution, is by no means a rigid rule. It is simply a rule adopted by courts, so far as applicable, to make sure that a complainant has not an adequate remedy at law.

See 5th Pomeroy's Equity Jurisprudence, p. 5114, Note 75.

Where the circumstances show, as they do here, that the prosecution of the assumpsit suit to judgment and execution would be of no avail, the requirement of judgment and return of execution is not necessary.

"The mere existence of a fraudulent transfer would not be sufficient to authorize a court of equity to entertain an action at the suit of an attaching creditor to set it aside. But when it is sought to make use of such transfer for the purpose of removing the attached property from the jurisdiction of the officer, who has it in his custody, it is evident that nothing but the equitable arm of the court can prevent the consummation of the wrong."

Caffman vs. Van Buren, 136 N. Y. at pages 260-261.

The present suit was brought be-

cause the goods attached were about to be shipped out of the State and come into the hands of an insolvent concern.

In a case of this kind, where the complainant has no legal right in the replevin bond or the replevin suit and the property garnisheed is about to be taken out of the State, we think it is eminently proper that equity should intervene.

If the respondent, Singer & Company, had seen fit to avail itself of its right under the decisions of this State to have intervened in the assumpsit suit instead of bringing the writ of replevin, its claim would probably have been determined long ago and the present litigation would have been unnecessary.

Demurrer overruled.

For Complainants: Cushing, Carroll & McCartin.

For Respondents: Frank H. Bellin and James B. Littlefield.

SUPERIOR COURT

David H. Slavit	} No. 52322
vs.	
Manuel Fratus, et al.	

RESCRIPT

July 1, 1922

BAKER, J. This action for malicious prosecution developed from a series of trespass and ejectment cases and equity suits brought by the present defendants against the present plaintiff. In this case the jury found in favor of the plaintiff for \$400 and the defendants ask for a new trial on the usual grounds.

The chief question is in regard to the matter of lack of probable cause, one of the essential elements of the plaintiff's case and which can not be inferred from malice. To meet this issue the defendants introduced evi-

dence that they had consulted an attorney and that they acted on his advice, and the point to be considered is whether the evidence showed that they made a full, fair, frank and free disclosure of all the circumstances leading up to the litigation, so that he could advise them properly. If so, they would have a good defence to this proceeding, because the plaintiff could not show lack of probable cause.

According to the testimony the attorney the defendant consulted was the same attorney who drew the lease under which the litigation arose. Apparently he was consulted more or less frequently. There was, perhaps, some conflict on the testimony as to whether certain matters were discussed with him, but the court believes these were minor matters, not involving the principal issues in the cases.

After considering the matter carefully, the court believes that the fair preponderance of the evidence shows that the defendants did make a full, fair frank and free disclosure to their attorney before the litigation in question was started. The evidence shows that the attorney had been advising the parties from the beginning and had knowledge of all the essential facts. It is true, as the plaintiff contends, that the defendant, Manuel Fratus, did not personally confer very much with the attorney. Practically all the business was done by his wife, the other defendant, and the court believes that the information imparted by her to the attorney was done on behalf of both defendants. From the appearance of the witnesses on the stand, it was clear that the defendant, Manuel Fratus, was uneducated and did not speak English very well, and that his wife, the other defendant,

looked out for the business of the family.

In view of the fact, therefore, that the court believes that the fair preponderance of the evidence show a full and fair disclosure to the attorney, the court finds that the verdict of the jury in this case was against the weight of the evidence and that justice requires that the case be submitted to another jury.

Defendants' motion for a new trial granted.

For Plaintiff: Bellin & Bellin.

For Defendants: Cooney & Cooney.

SUPERIOR COURT

James A. Mozealous }
vs. } Eq. No. 5779
Gilberto Moni }

RESCRIPT

July 6, 1922

TANNER, P. J. This is a petition to establish a mechanics' lien for materials furnished.

The petitioner furnished painting materials to a contractor, for painting two separate houses under a separate contract price for each house. The petitioner claims that he has a right to establish his lien on a single proceeding without showing how much material went into each house. The petitioner also claims that he can do this because the houses, although separate, are upon the same tract of land. At any rate his description has made his bounds include the whole tract of land upon which the houses are located. The buildings, however, are not in any wise appurtenant to each other and are entirely separate.

As we understand the decisions of this State, the petitioner can not,

therefore, establish his lien in this manner.

McElroy vs. Kiley, 27 R. I. 64.

McDuff Coal & Lumber Co. vs. Del Monaco, 32 R. I. 323.

The petition must therefore be dismissed.

For petitioner: Dubois & Dubois.

For respondent: Pettine & De Pasquale.

SUPERIOR COURT

John Walton

vs.

Charles F. H. Almy

} No. 51437

RESCRIPT

July 6, 1922

CAPOTOSTO, J. This is an action of trespass on the case for negligence. The jury having returned a verdict for defendant, the plaintiff moves for a new trial.

On behalf of the plaintiff it appeared that the plaintiff it appeared that the plaintiff, a police constable, of the town of Warwick, was at or near the gasoline station of the Auto Inn, so-called, on Norwood avenue in the town of Warwick, between 9:30 and 10 o'clock on the evening of June 5, 1921, and that while there he had his attention called to the defendant driving his automobile along Norwood avenue in a northerly direction towards Providence at a rate of speed estimated by himself and his witnesses at between 35 and 40 miles an hour, darting in and out of traffic and apparently disregarding the signal to stop given by a brother officer of the plaintiff.

According to the plaintiff the gasoline station in question is approximately 600 feet from the bridge spanning the Pawtuxet river, the thread of which is the dividing line between the town of Warwick and the city of

Cranston. About 900 feet east from the bridge is the Oakland Beach crossing, so-called, of the Rocky Point-Buttonwoods line. The accident occurred some 1350 feet beyond this crossing. The total distance from the gasoline station to where the plaintiff claims the accident happened is approximately 2850 feet.

Norwood avenue between the points in question is practically a straight road about 30 feet wide, with a single line of car tracks on its westerly side. For at least 18 or 20 feet in width, the road is of macadam or asphalt construction. On the night of the accident the weather was clear, the road dry, and the street well lighted by street lights about 200 feet apart.

The plaintiff, who was in full police uniform, testified that he set out on his motorcycle in pursuit of the defendant, to get him for speeding and failing to stop on a signal from an officer. In following the defendant, the plaintiff crossed the bridge from Warwick into the city of Cranston. At the Oakland Beach crossing, he caught up to the defendant's automobile, remained behind for some distance for the purpose of timing him, and ascertained that the defendant was then going at the rate of 52 miles an hour. The plaintiff then swung his motorcycle to the left of the defendant's automobile and, getting into a position where the defendant could see him, told him the (defendant) to pull over to the right. Mr. Almy thereupon reduced his speed to about 30 miles an hour, bore to his right and then turned sharply to his left. It was then for the first time that the plaintiff noticed the headlights of another automobile, not more than 75 or 100 feet away, coming towards him. The plaintiff further testified that this automobile, driven by one John Feltham of Oakland Beach, reduced its speed and swerved over into the car

tracks to give the plaintiff a chance to get by, but the front wheel of the plaintiff's motorcycle struck the rear wheel of the Feltham car, throwing the plaintiff to the ground and inflicting fairly substantial injuries. At no time did the plaintiff come into contact with the defendant's car.

The defendant's version of the accident denied seeing the plaintiff at any time and disregarding any signal from an officer. He testified that on the night in question he was returning with his wife and child from his summer home in Matunuck; that he drove an eight-cylinder Cole automobile at various rates of speed up to possibly 40 miles an hour; that he heard the noise of a motorcycle behind him for some distance, but paid no attention to it. Mrs. Almy, the defendant's wife, who was riding on the front seat with him, testified that, hearing the noise of a motorcycle apparently approaching at a high rate of speed, she turned and saw a motorcycle about even with the rear of the defendant's automobile; that she looked forward for a short distance and then, moved by curiosity, looked back again and saw the motorcycle drop to the ground some distance directly in the rear of defendant's automobile. Both Mr. and Mrs. Almy denied that there was any sharp turn to the left made by the defendant just before the plaintiff was hurt, or that, as far as they recollected, there was another automobile in the immediate vicinity.

The real issue presented was a pure question of fact as to whether or not the plaintiff was in the exercise of due care at the time of the accident. Either excessive zeal or resentment at the defendant's conduct made the plaintiff disregard the plainest rule of conduct for his own safety. Outside of the town of Warwick the plaintiff had no greater rights on the highway, even though in uniform, than the ordinary individual.

The defendant in his discretion having refrained from asking for a direction of the verdict, the case was submitted to the jury and a verdict was returned in favor of the defendant. And other verdict would not have done justice between the parties.

At the hearing on the plaintiff's motion for a new trial, considerable stress was laid by the plaintiff on certain alleged newly discovered evidence, which turned out to be nothing more than the testimony of Mr. John Feltham, the driver of the automobile against which the plaintiff claims he was thrown by the defendant's conduct. The plaintiff had in fact summoned Mr. Feltham as a witness at the trial and after calling out his name in the court room several times saw fit to close his case and go to the jury without the testimony of this witness, in spite of the fact that he was offered opportunity and assistance by the court to secure his attendance. There is no ground or reason for the plaintiff to invoke the rule of newly discovered evidence under these circumstances. Considering the testimony of Mr. Feltham, as set out in the affidavit of Mr. Gunning, in its most favorable light to the plaintiff's case, the fact still remains that the plaintiff's own conduct was the real cause of the accident.

Motion for new trial denied.

For Plaintiff: William A Gunning.

For Defendant: Pirce & Sherwood.

SUPERIOR COURT

Frederick A. Stevens

vs.

Claire F. Stevens.

} Div. No. 14838

RESCRIPT

July 7, 1922

CAPOTOSTO, J. This matter is before the court on petitioner's motion to discontinue his petition after a de-

termination of the respondent's motion for allowance and counsel fees had been made in her favor by rescript filed March 27, 1921.

While each party in this case emphatically complains of the living conditions created by the other since the filing of the petition, the evidence given at various hearings between February 25, 1922, and June 17, 1922, on respondent's motion for allowance and petitioner's notice to discontinue, taken as a whole does not disclose any serious hardship suffered by either one, excepting the annoyance and lack of consideration of each other's feelings engendered by two irritated and stubborn individuals living through choice or necessity in daily contact with each other.

The petitioner has furnished between the dates above indicated the actual necessities for the home. Whether or not he has supplied the respondent with means for such personal effects and incidental expenses which a woman in her position in life might reasonably desire and incur is difficult to determine from the conflicting evidence presented.

The petitioner having brought the petition which has resulted in continued and rather bitter litigation between the parties now seeks to discontinue his action. In view of all the facts, the petitioner is allowed to discontinue upon complying with the following modifications of the order of March 27, 1922; that is to say, the petitioner shall pay to the respondent for her own personal use the sum of twenty dollars a week from March 11, 1922, to the date of the filing of this rescript, and further to pay as counsel fees the sum of two hundred dollars to the attorneys of record of the said respondent.

For Petitioner: Waterman & Greenlaw.

For Respondent: Flynn & Mahoney and Fitzgerald & Higgins.

SUPERIOR COURT

Edwarda Olivera
vs.
J. & P. Coats
(R. I.), Inc. } W. C. A. No. 357

RESCRIPT

July 7, 1922

HAHN, J. This is a petition under the Compensation Act in which the petitioner seeks to recover full compensation for permanent total incapacity.

It appeared in evidence that the first two fingers of the plaintiff's left hand had been badly crushed in the operation of a doubling machine, but that, according to the weight of the medical testimony, including that of Dr. Kingman, appointed by the court, training and exercise for a period of one or two months would be necessary to strengthen the fingers so that petitioner could engage in the occupation of a bobbin fixer (which employment respondent has offered to give petitioner) at \$15.40 per week, her salary previous to that time having been \$17.61 per week.

It appeared that the employer had paid full compensation up to Sept. 24, 1921, and that it will require in the neighborhood of two months before petitioner can so strengthen her hand that the same can be used in bobbin fixing.

We find that full compensation should be allowed for nine (9) weeks succeeding Sept. 24, 1921, in order that she may be compensated for the time necessary to train and exercise the injured hand.

We also find that the earning power of petitioner is permanently decreased to the extent of \$2.21 per week and that she is therefore entitled to the

sum of \$1.11 for 265 weeks, or until further order of the court.

For petitioner: Patrick E. Dillon.

For Respondent: Green, Hinckley & Allen.

SUPERIOR COURT

Namasket Mill

vs.

Providence Braid Co.

Law No.

50119

RESCRIPT

July 7, 1922

TANNER, P. J. This is an action for damages caused by defendant's alleged repudiation of its contract to take cotton yarn which was to be manufactured by the plaintiff at an agreed price.

From the declaration we understand that the contract was repudiated before any of the yarn was manufactured. The declaration alleged as an element of damage the purchase of cotton to manufacture yarn required by said contract and depreciation in its value; also other obligations incurred by the plaintiff relying upon said contract.

The defendant moved for a bill of particulars of the amounts and prices of said cotton purchased by said plaintiff, also the times of its purchase and the names of the parties from whom purchased, also for a specification of other obligations incurred by said plaintiff.

The plaintiff replied to said motion by stating that it had bought large quantities of cotton from time to time in advance of this particular contract and for the purpose of carrying out all its contracts; that it had made no appropriation of cotton for the performance of this contract with the defendant; that it had bought the cotton at various times from different brokers at different prices, and that the obligations referred to in the dec-

laration were employment of help and the usual obligations of such a contract.

The defendant has filed a motion for an additional bill of particulars, urging that it be given the prices paid for the cotton bought by the plaintiff, the times when bought and the names of the sellers of said cotton, and moves, in the alternative, that the plaintiff's allegations of damage in this respect be stricken from the declaration.

Plaintiff admits that it will be necessary under its allegation of damages to prove that it would have appropriated specific cotton to the performance of the contract, and to prove the quantities and prices of said cotton so appropriated. The cost of said cotton so appropriated, less the amount for which plaintiff could have sold said cotton on notice of repudiation of the contract, plus the other expenses of manufacturing would be the cost of the yarn called for by the contract price would be the damage to the plaintiff. This would be the rule in a case like this where no yarn was actually manufactured.

In following this method of figuring damages the plaintiff will doubtless at trial face the objection that it is entirely speculative to attempt to state what particular cotton would have been appropriated to its contract with the defendant in view of its contracts with other parties. If it can, however, do this to the satisfaction of the trial court, it would seem to us that it could so now, and if it can do so now, we do not ourselves see why it can not from its books tell the defendant what said cotton cost and when bought and from whom. It may be, however, that we are mistaken in this. If so, the plaintiff can protect itself from further answer by swearing that it can not do so and giving its reasons. Plaintiff can not be required to give particulars under pen-

alty of having its case dismissed if it gives all the particulars it can furnish and swears that it is not in its power to furnish others and gives good reason for its inability.

3rd Ency. Pl. & Pr. 525, Note 1.

3rd Ency. Pl. & Pr. 531, 5, Note 2.

If the plaintiff is willing to comply with this condition, no other particulars will be required.

It has seemed to the court that the difficulties which have arisen in this matter might be avoided by adopting what seems to us a simpler and equally adequate method of proving damages. It seems to us that the plaintiff might easily figure what it would have cost to have purchased cotton required for this contract at the appropriate times and at the then market prices. Adding to such cost of cotton the further cost of manufacture and deducting the total from the contract price, the plaintiff would have its loss of profit. This method seems to us to give the plaintiff all the loss he would have sustained on the cotton bought by giving him as profit the difference between the depreciated market price of cotton and the price for which it was actually bought by the plaintiff. It seems to us that it will also obviate the difficulty which we think the plaintiff will incur in attempting to show just what cotton he would have appropriated for the manufacture of yarn under this contract. This, however, is merely one of the suggestions that courts feel bound to make but which are not always favorably received or adopted by litigants.

The motion is granted subject to the right of the plaintiff to protect itself from further answer by affidavit as already suggested.

For Plaintiff: Tillinghast & Collins.

For Defendant: Swan, Keeney & Smith.

SUPERIOR COURT

William Connole

vs.

Luke Connole, et al.

} Eq. No. 5102

DECISION

July 12, 1922

BROWN. J. This is a bill in equity for partition of certain real estate. The same having been sold at auction under a decree of court for the purpose of making partition, the cause is now before the court on motion of Clara Connole, widow of John Connole, deceased, through whom the several parties derive their respective interests for an order of distribution of the proceeds of the sale now in the registry of the court.

John Connole of the city of Cranston, deceased intestate, in February, 1906, leaving no issue, but did leave the petitioner, his widow, and as his heirs, William Connole, Thomas Connole and Luke Connole, brothers.

Luke Connole was appointed administrator and settled the estate, the real estate herein involved not being required to pay debts. By an amicable arrangement between the parties the property was cared for by one of the brothers, the rent collected and one-third of the net profits paid to petitioner as widow for several years. On petition of Clara Connole, the Probate Court of the city of Cranston by decree entered November 14, 1919, assigned to her dower out of the real estate of John Connole, thereby decreeing that she have and receive therefor one-third of the net rents and profits arising out of said estate, as provided by Section 17, Chapter 329, General Laws, 1909, payable on or before the 10th day of each and every month, said sum to be and remain until further order of this court a fixed charge upon the estate of which

said John Connole died, seized and possessed. This decree was entered by consent.

A portion of the above estate in which dower was assigned by said decree is non-productive.

Subsequent to the assignment of dower as above, the Probate Court of the city of Cranston, on petition of the widow, allowed to her in addition to dower, under authority conferred by Section 9, Chapter 313, General Laws, 1909, by decree entered July 30, 1920, one certain lot of land with the buildings and improvements thereon, situated in Cranston, on the Old Park avenue, also three certain lots of land with all the buildings and improvements thereon, situated in said Cranston, and numbered 361, 362 and 363 on the Sprague Homestead Plat, "she to hold such real estate in addition to her dower, subject to the same conditions and for the same time as she holds her estate of dower."

The above assignment in addition to dower embraces all the productive real estate. One-third of the net rents and profits arising from this last assignment, made in addition to dower, already had been assigned as dower by the first decree mentioned, entered November 14, 1919.

Counsel for the heirs as opposed to the claim of the widow argues that as the sum assigned under the first decree is "to be and remain until further order of this court a fixed charge upon the estate," etc., and that as she holds the allowance in addition to dower made by the decree entered July 30, 1920, "subject to the same conditions and for the same time as she holds her estate of dower," both decrees are temporary, and that she has no life estate under either.

A doweress has a life interest in the estate assigned to her as her dower.

The Supreme Court in the case of Luke Connole, et al. vs. Clara Connole, Ex. Ec., No. 5483, has decided

that the assignment of dower above mentioned to Clara Connole by the decree entered Nov. 14, 1919, is valid. She therefore has a life interest in the estate so assigned.

By the provisions of the statute under which the estate in addition to dower was allowed to her, and also by the terms of the decree allowing the same, she shall hold such estate "subject to the same conditions and for the same time as she holds her estate of dower." She therefore is entitled to hold and enjoy for life the estate so assigned, and allowed to her under said decrees and in accordance with the terms thereof.

By the first decree she is entitled to hold for life one-third of the net rents and profits arising out of the whole of the estate. By the second decree she is allowed for life the whole of the productive estate. As one-third of this productive estate, or the net rents and profits arising out of the same, which is equivalent thereto, is already assigned to her under the first decree, she can obtain by the second decree only the remaining two-thirds of the productive estate.

The proceeds of the sale are to be treated as real estate. Clara Connole requests that her interest in the proceeds of the same be reduced to its present value and that she be allowed a gross sum in satisfaction and extinguishment of her dower right, and her allowance in addition to dower.

In the case of Sheffield vs. Cooke, 39, R. I. 217, 268, the Supreme Court says, "Although there is an absence of specific statutory authority for the proposition that the widow may be awarded a gross sum as dower in the proceeds of sales of land, the cases and authorities submitted show that such an award may be made when the circumstances justify it."

The circumstances of this case appear to justify compliance with the widow's request. Her request in this

regard, therefore, will be granted.

The unimproved real estate sold for \$1435, and the improved for \$7290, making a total of \$8725. Deducting from this sum the commissioner's fee for services and disbursements as allowed by the court, the commissioner paid into the registry of the court the balance, amounting to \$7921.10. From this sum must be paid to the clerk, the registry fee amounting to \$80; the fee of Richard E. Lyman as master, amounting to \$25, and the taxes paid by Luke Connoles to the city of Cranston in the years 1918 and 1919, amounting to \$255.78, amounting in all to \$360.78. Deducting this amount from \$1435, the proceeds from the sale of the non-productive estate, leaves a balance of that fund of \$1074.22; in one-third of this balance, or in \$358.07, the widow has a life estate, and in the total balance of the fund in the registry of the court, which amounts to \$846.88, she also has a life estate, making a life estate in the widow in the sum of \$7204.95 of the amount now in the registry of the court.

Mrs. Connoles I find to be 54 years of age. Reducing this amount to its present value, according to the rule laid down by standard authority on the basis that the amount would draw 6 per cent., we find the present value of the life estate of Clara Connoles in the amount in the registry of the court is \$4219.33. The same rule is applied in this computation to the allowance in addition to dower as to dower.

The other parties to the bill are entitled to the balance of the fund in equal proportions. Such interest as has accrued on this fund while in the registry of the court is awarded to the respective parties in proportion to their several interests and will be provided for in the decree to be entered.

A decree may be entered directing the payment of the amount in the registry of the court to the several

parties according to their several interests as herein determined.

For Complainant: E. M. Sullivan and J. J. Sullivan.

For Respondents: Cooney & Cooney and D. A. Colton.

SUPERIOR COURT

Albert Hall

vs.

Granville P. Lindley

} Eq. No. 5656

Pawtucket Sash &
Blind Co.

vs.

Frank A. Coffey, Et. Al

} Eq. No. 5664

Hawkins Lumber Co.

vs.

Frank A. Coffey, Et. Al

} Eq. No. 5665

DECISION

July 14, 1922

BROWN, J. The several causes indicated above are petitions to establish a mechanics' lien. In each cause the respondents filed a motion to dismiss, which several motions, by agreements, were heard together.

The following facts were agreed to or established by evidence at the hearing.

Frank A. Coffey had the record title to the land sought to be liened, or on which the building sought to be liened stands, but Joseph F. Williams was in fact the owner of a little more than one-half interest therein, which fact does not appear of record. Granville P. Lindley had an option to purchase the same, bearing date, June 29, 1921, signed by Joseph F. Williams, in form as follows: "Received of Granville P. Lindley, one hundred fifty (\$150) dollars for rent of bungalow, No. 6 Spring Ave., Bay Spring, R. I. Same to apply as part payment on purchase price of sixteen hundred (\$1600) dol-

lars. Option to purchase house to expire, Aug. 15, 1921."

Neither Mr. Coffney nor Mr. Williams had any contract, written or oral, with either of the complainants to perform work or furnish material for the construction or reparation of the house. The material furnished and work performed was at the request of Mr. Lindley, who afterwards abandoned his contract of purchase.

There is no evidence which would warrant the establishment of a lien on the interest of either Mr. Coffey or Mr. Williams, and as to Mr. Lindley, he has no interest. The option expired without his exercising it, and he abandoned it altogether.

The motion to dismiss the three petitions is granted.

For Petitioners: William M. P. Bowen and Greenough, Easton & Cross.

For Respondents: John P. Beagan.

SUPERIOR COURT

Lucy A. Haviland

vs.

Albert W. Kenyon,
Executor under the
will of Samuel W.
K. Allen

P. A. No. 75

RESCRIPT

July 19, 1922

BARROWS, J. Heard by the court without a jury on appeal from a \$600 allowance made by the Probate Court of East Greenwich to Emma V. Allen, the widow of Samuel W. K. Allen, for six months' support following his decease on December 4, 1919.

The facts show the marriage of the now widow and Allen in the early part of 1915. At that time an antenuptial agreement was made in which each waived rights of dower and curtesy in the other's property, or

right to contest a will, allowed complete disposal during life or by will of both real and personal property by either as if unmarried, and in case of death of either intestate provided that the property should descend as if deceased were unmarried. Nothing was said in regard to an allowance for support. During the marriage the income, rents and profits of both were to be used "for the support and maintenance of both during the life time of both." This agreement evidently meant upon the death of either to leave his or her estate untrammelled by any claim of the other.

The evidence now before us showed that Allen's estate, including real and personal property, amounts to about \$6650, and that it is insolvent; that Mrs. Allen's property at her husband's death consisted of real estate worth approximately \$8000, from which she says she received rentals of \$75 per month, all of which, previous to her husband's death, went to their joint support. Allen never gave her any money for her support. They lived on his farm at West Greenwich. Her rentals, as stated by counsel at the hearing on July 17, amounted to \$101 per month, out of which we assume \$26 per month went for taxes, repairs, etc., leaving a net of \$75 as per Mrs. Allen's testimony. From Allen's estate subsequent to his death the widow had the use if desired of the farm from December, 1919, to May, 1920, and received about \$48 for rent of the farm thereafter, and \$64, less \$22.50 expenses, for eight months' rental of Allen's East Greenwich house from January to October, 1920, a total of nearly \$100 cash.

Mrs. Allen testified, and it was undisputed, that after Allen's death, she went to live with a daughter and paid \$10 per week board until April, 1920, and that her total living expenses during that time were \$25 per week; that thereafter she kept house and her

necessary living expenses were \$30 to \$35 per week until she went to reside with her son at some date which does not appear.

There is no evidence that she borrowed money for their joint support while both lived or for her necessities after her husband's death.

Appellant claims that the facts do not show that for necessary living expenses she needed an allowance from Allen's estate to provide for her during the six months after his death; that, financially speaking, she was less in need of aid from the estate than she had been from Allen prior to his death, and that the case is ruled by *R. I. Hospital Trust Co. vs. Hopkins*, 39 R. I. 59. Counsel quote the language approved by the majority opinion at page 77 and at page 79. The former quotation is as follows: "The allowance now under consideration is not made to the widow as a reward for faithful services as a wife; nor is it given out of the husband's estate as compensation to her for ill-treatment by him as a husband; but it is a question solely of her actual necessity. But she had no family to support, no child to provide for; all her separate property, which was very considerable, was secured to her on her marriage, and was considerably increased before the decease of her husband. No new duties devolved upon her by that event and she incurred no additional expenses."

While we have much sympathy for the widow and lean toward a liberal construction of the statute, we feel bound by the strict interpretation of the *Hopkins* case, *supra*, and are unable to perceive that the widow's necessities for six months' support after husband's death warrant an allowance. After her husband's death she had as much income as before and less outgo. If it sufficed before, we see no reason why it should not do so after his death. She received from

his estate approximately \$100 and if she was entitled to any allowance, it would have been a very small one. It seems to us that the allowance is not a necessary payment to support the widow during the six months following Allen's death. Under the circumstances we find no allowance should be made.

We therefore hold that the Probate Court at East Greenwich erred in granting the prayer for allowance.

For Appellant: Curtis, Matteson, Boss & Letts.

For Appellee: Fitzgerald & Higgins.

For Executor: Waterman & Greenlaw.

SUPERIOR COURT

Seneca Kettell, Et. Al }
vs. } M. P. No. 481
City of Providence }

RESCRIPT

July 21, 1922

CAPOTOSTO, J. Petition for the assessment of damages for the taking of the plaintiff's land for reservoir purposes. The jury assessed damage in the sum of \$2951. The defendant moved for a new trial on the ground that the damages as assessed are excessive.

Mr. and Mrs. Kettel's home in December, 1916, consisted of a six-room cottage upon a piece of clear and good garden land, approximately 1.20 acres in area with a frontage of 60 feet on the westerly side of the Greenville road, so-called, and located within one-half a mile of the village of North Scituate. The cottage was moved to its present location in 1913 and substantially repaired. In this same year the plaintiffs built a small shop some 12 feet by 16 feet and a hen house 51

feet by 8 feet on the premises. The location of the land, with its easterly exposure and its view of Lake Moswansicut, together with its nearness to the village of North Scituate and, consequently, to stores, churches, library, means of transportation and other activities, made plaintiffs' place a most desirable one for a comfortable home.

In considering the values placed upon these premises by the various experts, attention is called to the fact that the land in question could not be easily classified either as farm land or village property. On both sides considerable evidence was introduced of other sales in Scituate and elsewhere of so-called similar land, but in most, if not all instances, the similarity was one in name and not in fact. The jury had advantage of a view of the premises and undoubtedly appreciated and took into consideration in assessing the damages the peculiar location of the premises. The highest priced fixed by the petitioners' witnesses was \$3100; the lowest \$2795. For the city of Providence the highest price set by the experts was \$1600 and the lowest \$1400. The jury apparently disregarded the figures given by the city's experts as too low and, in view of the peculiar location, size, use and character of the premises, were in a way justified in so doing. This fact was practically conceded by the city's representative at the argument on the motion for a new trial when he suggested to the court that a fair market value of the petitioners' land would be around \$2000. The jury, therefore, was undoubtedly guided in its deliberations by the figures given by the petitioners' witnesses and, as clearly seen on analysis, reached its conclusion by relying upon the market price fixed by Mr. John C. Cosseboom of \$2800 and of Mr. J. Curtis Hopkins of \$3100, adding these two sums together, which gives \$5900,

and dividing it by two, with a result of \$2950.

The jury's opinion, as expressed by its verdict of \$2951, even though somewhat too liberal, is entitled to serious consideration where it is supported by evidence introduced on behalf of one of the contending parties. To do otherwise would be in effect to deprive petitioners of the specific remedy provided by the statute under which the property is taken. In view of all the circumstances of this case, therefore, I feel that the sum of \$2600, or \$351 less than the award made by the jury, will do substantial justice between the parties. This sum, while not disturbing the basis of the jury's finding, frees the verdict from any over-liberality caused, possibly, by the very low values testified to by the city's witnesses.

If within ten days after notice of this decision the plaintiffs remit the sum of \$351 and accept judgment for \$2600 and interest thereon from December, 1917, a new trial is denied, otherwise granted.

For Petitioner: James Harris.

For Respondent: Elmer S. Chace, and Herbert E. Eklund.

SUPERIOR COURT

Hugh P. Ferrari Et Al.	} No. 53163
vs.	
Morris Perlow	

RESCRIPT

July 21, 1922

CAPOTOSTO, J. This is an action of assumpsit brought by the plaintiffs, co-partners in the real estate business, to recover a commission under a contract of exclusive agency of the sale of certain property belonging to the defendant.

It is claimed by the plaintiffs,

through the witness, Mrs. Sarah M. Routhier, who secured from the defendant the written agreement in question, that on December 29, 1921, the defendant signed the contract which forms the basis of this action, giving to the plaintiffs the exclusive agency for a period of thirty days of the sale of certain property belonging to the defendant in the city of Pawtucket; that she used a fountain pen with green ink in filling in the data referring to the defendant's property and that, the pen having run dry before finishing, she secured some dark ink from the defendant and, still using the same fountain pen, filled in the fact of the contract, including date, number of days the agreement was to remain in force and the commission to be received by the plaintiffs. According to this witness, no changes, insertions or additions were made to the contract after the defendant had signed the agreement written by her in his presence.

The plaintiffs then offered testimony tending to prove that while they were making reasonable efforts to sell the defendant's property by notifying prospective customers and advertising the property in Providence and Pawtucket papers, the defendant sold the property for \$34,000 through another broker on January 23, 1922, which was within the period of thirty days covered by the agreement. In view of the fact that the contract in question called upon the defendant to pay a commission of three per cent. to the plaintiffs "upon any sale of said property while this agreement remains in force, whether such sale be made by the said agent or myself or by any other agent acting for me," the plaintiffs maintained that they were entitled to the sum of \$1020.

The defendant, on the other hand, while admitting giving the plaintiffs the exclusive agency for the sale of his property for a period of thirty

days, denied that the agreement was dated when signed by him. He maintained that the date was left blank by Mrs. Routhier; that the agreement was entered into by him on December 20, 1921, and that he had a right to effect a sale through another broker on January 23, 1922, as the time limit set in the agreement with the plaintiffs had expired.

In support of this contention the defendant presented three witnesses, whose testimony in substance was that they were in the defendant's store, one for one reason or another, one day the early part of the week before Christmas, 1921, and that it was then that the defendant had made his agreement with Mrs. Routhier. The defendant further introduced the testimony of Mr. Joseph H. Clarke, a handwriting expert, to the effect that the date December 29, although in the same handwriting, was written under different conditions and with different ink from the rest of the face of the contract. While testifying Mr. Clarke used a table microscope to substantiate his contentions and offered to let the jury see for themselves the suggested discrepancies under the lenses. This invitation being accepted by the attorneys for both sides each member of the jury was permitted to examine the exhibit through the microscope as set by the handwriting expert.

The jury having returned a verdict for the plaintiffs for \$1020, the defendant moves for a new trial on the usual grounds and on account of newly discovered evidence.

The case presented a clear cut issue of facts. On one side was the testimony of Mrs. Routhier; on the other the evidence given by the defendant and his witnesses. It was for the jury to say on what date the contract was actually executed in view of all the circumstances. It was proper for it to consider the good faith or motives

underlying the testimony of both plaintiffs and defendant; it was for it to say whether or not the explanation given by defendant's witnesses of their recollection of the time when the transaction actually took place was reasonable, colored or mistaken; it was within its province to give the testimony of the handwriting expert such consideration as it might believe it deserved; it was its right to draw such inferences as might reasonably suggest themselves after a careful microscopic examination of the contested writing by each member of the panel. These and other similar questions the jury had a right to consider and pass upon in arriving at its verdict.

Admitting that the case presents a rather close question, I can not say that the jury, having in mind undoubtedly the fact that two different inks were used through the medium of the same fountain pen, was not warranted in reaching the conclusion that the date, December 29, was written in at the time the defendant executed the agreement, and that the variation in the ink, if any existed, was due to the careless use of the fountain pen by Mrs. Routhier.

The newly discovered evidence offered as a ground for a new trial is the testimony of another witness who is said to have been present in defendant's store at the time that the defendant signed the agreement, and who was away from Rhode Island at the time of the trial of this case. At best this evidence is cumulative.

Defendant's motion for a new trial is denied.

For Plaintiff: Thomas L. Carty

For Defendant: Adolph Gorman.

SUPERIOR COURT

Cloria Gaspoli

vs.

Rocco Caruso

RESCRIPT

July 21, 1922

CAPOTOSTO, J. This is an action of assumpsit for breach of promise of marriage. The jury having returned a verdict for the plaintiff in the sum of \$2150, the defendant filed a motion for a new trial on the usual grounds.

The plaintiff, a widow, with five children, one of whom is in Italy, received the defendant's attentions for about a month prior to the securing of the marriage license on February 1922. The defendant refused to marry 1922. The defendant refused to marry the plaintiff because, as he maintained, she had deceived him as to the number of children which she had, the defendant testifying that the plaintiff had told him that she had three children and only acquainted him with the fact that she had five children after having secured a marriage license. This, the plaintiff denied, and said that the defendant was fully aware of the number of children in her family from his own observation and from her statements to him.

While the testimony as given by the plaintiff on this point would make one scrutinize it with the utmost care, yet it being a pure question of fact, I can not say that the jury was not warranted in finding a verdict for the plaintiff.

The principal ground urged by the plaintiff in her claim for damages was that at the solicitation of the defendant she had given up "keeping company" with another man whom she expected to marry. There was no evi-

dence whatsoever of who the other man was; how long she had known him; what benefits she might have derived from a marriage to him, or that the other man had actually promised to marry her. Moreover, her affections for him must not have been very strong when we consider that the plaintiff gave this other man up on the mere statement of the defendant that he was going to ask her to marry him. The defendant, moreover, was a man possessed of no property or money and out of employment at the time he promised to marry the plaintiff. There was no evidence of any impropriety on the part of the defendant toward the plaintiff at any time, nor was there any reflection cast upon the plaintiff's character during the trial. The plaintiff, furthermore, suffered no actual pecuniary loss by reason of the defendant's conduct either

through loss of employment or expenses incurred on account of her prospective marriage, and no impairment of health, due to the defendant's refusal to keep his promise to marry her. The humiliation suffered by the plaintiff was slight, if not entirely problematical. In view of the evidence as presented, the jury's verdict of \$2150 is grossly excessive. What motive may have influenced the jury to act as it did is immaterial and pure conjecture. Under all the circumstances of the case the sum of \$500 is a liberal compensation for any damages suffered by the plaintiff.

A new trial is therefore granted unless the plaintiff within ten days of notice of this decision remits all damages in excess of \$500.

For Plaintiff: Charles R. Easton.

For Defendant: Louis V. Jackvony.

NOTICE

The Superior Court rescripts contained in this issue have accumulated since the tail end of last season and are published at this time as the wind-up of Volume 2, in order that there may be a complete record for the purpose of annotation.

Subscribers who have lost any of the issues of last year may have a duplicate copy by notifying this office.

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